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AN
ABRIDGMENT
OF THE
LAW OF NISI PRIUS.
VOL. I.

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By WILLIAM SELWYN, JUN. ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW.

Quilibet scriptor adeò anxie sit sollicitus, ut ad veritatem dicat, perinde ac si totius operis fides uniuscujusque periodi fide niteretur. **PREF. 6 REP.**

THIRD EDITION,
WITH CONSIDERABLE ADDITIONS.

LONDON:

Printed for W. CLARKE and SONS, Law Booksellers,
Portugal Street, Lincoln's Inn; and J. Cooke, Dublin.

1812.

Davidson. Printer,
Old Bowell Court, London.

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TO THIS THIRD EDITION.

ANOTHER impression of this work having been called for, the Compiler has embraced the opportunity to insert two new Chapters, under the titles of Mandamus and Quo Warranto, in which he has endeavoured to treat those important subjects in as full and comprehensive a manner as the nature of an abridgment will permit. The cases which have been decided since the publication of the second edition, are inserted under the proper heads. An Appendix, containing some practical forms, which may be useful at the sittings and assizes, has been subjoined; and the Index to the principal matters has been enlarged. In other respects, this edition corresponds with the former.

*Lincoln's Inn,
July, 1812.*

PREFACE

TO SECOND EDITION.

THE object of the following work is to investigate and explain that branch of jurisprudence, which teaches the nature and extent of the remedies prescribed by the law of England for the redress of private wrongs, or, as they are frequently termed, civil injuries. Considering the utility and importance of the subject, it cannot fail to excite the surprise of the reader, when he is informed that a well-digested treatise on the law of actions remained for so great a length of time a desideratum in the profession, that it was not until the year 1767, that an anonymous compilation, (the first deserving any notice) entitled “An Introduction to the Law relative to Trials at Nisi Prius,” was published. The same work was *republished* by the late Mr. J. Buller, in the year 1772. Though the title page is silent as to this being a second edition, yet, from an examination of the contents, it appears very clearly that Mr. J. Buller’s book is merely a republication of the anonymous treatise.

tise published in 1767. It is very remarkable, that at this day so many different opinions should exist as to the real author of this compilation; some persons ascribing it to Mr. Ford, others to the late Mr. J. Clive, and others to Mr. Bathurst. Unquestionably it was the received opinion at the bar, upon the first appearance of this work, that it had been compiled by Mr. Bathurst, afterwards Lord Apsley, for his own private use. But the dedication by Mr. Buller to Lord Apsley, prefixed to the edition in 1772, which must have escaped the notice of those persons who have so confidently ascribed this work to a different author, places the question beyond the reach of controversy. That dedication expressly recognises this treatise as owing its origin to a collection of notes formerly made by Lord Apsley for his own private use.

Mr. Bathurst's book having passed through several editions, was succeeded by a similar work, entitled "A Digest of the Law of Actions and Trials at Nisi Prius," by Mr. Espinasse, of which there have been three editions.

The compiler of the following pages conceived that a treatise, intended as a companion at the sittings in London and Middlesex, and on the circuit, might be cast into a more convenient form than that adopted by either of the former writers; and that the cases might be

abridged with greater accuracy and precision. Under this impression, the Abridgment of the **Law of Nisi Prius** was prepared and published in three parts successively, in the years 1806, 1807, and 1808. The second edition is now submitted to the candour of the profession.

The cases which have been decided since the publication of the former impression, and which are inserted under the proper heads; two new chapters on the law relating to partnership, and stoppage in transitu, subjects of considerable importance in the present state of trade and commerce; together with a general index, constitute the principal difference between this and the former edition. A few cases decided by Lord C. J. Raymond (inserted for the first time in the present edition principally under title **Common**), have been transcribed from the MSS. of the late Mr. Serjeant Leeds which form a part of Mr. Serjeant Hill's collection, lately purchased by the Society of Lincoln's Inn.

Lincoln's Inn,

Nov. 1809.

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CHAP. I.

OF THE ACTION OF ACCOUNT.

- I. *In what Cases the Action of Account may be maintained.*
- II. *Of the Pleadings and Evidence.*
- III. *Of the Judgment,*
 1. *To account.*
 2. *Final.*
- IV. *Execution.*

I. *In what Cases the Action of Account may be maintained.*

A PREFERENCE, of late years, having been given to the mode of proceeding by bill in a court of equity, (where a discovery by the defendant's answer upon oath may be obtained,) and having the account taken before a master in the Court of Chancery, or before the deputy-remembrancer in the Court of Exchequer, the action of account has in a great measure fallen into disuse. It will not, therefore, be necessary to enter fully into the nature of this action, but briefly to apprise the reader in what cases it may be maintained, what pleas may be pleaded to it, and in what form judgment may be entered.

To maintain an action of account^a, there must be either a privity in deed, by the consent of the party, (for an action of account does not lie against a disseissor or other wrongdoer,) or a privity in law, as in the case of a guardian, &c.

By the common law, an action of account may be maintained by the heir, after he has attained the age of 14 years^b,

^a 1 Inst. 179. a.

^b Lit. s. 123. 1 Inst. 89. a.

against the guardian in socage (1); so at the common law account will lie against a bailiff (2) or receiver^e, and in favour of trade and commerce by one merchant against another. But this action did not lie for one joint-tenant, or tenant in common, against his companion, although he should have taken the whole profits to his own use, unless he had been appointed bailiff to render an account^d. But now, by stat. 4 Ann. c. 16. s. 27. an action of account may be maintained by one joint-tenant, or tenant in common, his executors or administrators, against the other, as bailiff, for receiving more than his share or proportion, and against the executors or administrators of such joint-tenant, or tenant in common.

One tenant in common brought an action of account against another^e, and charged him as bailiff and receiver. As to the account against him as bailiff, the defendant entered into the account; and as to the account against him as receiver, demurred specially, because the plaintiff did not state by whose hands the defendant received the money: the court held the exception good, notwithstanding 4 Ann. c. 16. s. 27. for that statute only empowered the plaintiff to charge the defendant as bailiff; but as the plaintiff had gone further, and charged the defendant as receiver, he ought to have shewn by whose hands he received the money, as was required by the common law^f. As the statute is a general statute, it is not necessary for the plaintiff to set it forth, or to refer to it: but he must set forth so much as to bring his case within the statute^g; and, therefore, in an action of account, by one tenant in common against another, upon this statute, the plaintiff must state in his declaration, that he and defendant were tenants in common, and that defendant

^e 1 Inst. 172. a.

^d 1 Inst. 200. b.

^e Walker v. Holiday, Comyn's Rep. 272.

^f 1 Inst. 172. a.

^g Wheeler v. Horne, Willes, 202.

(1) The guardian in socage, like all other accountants, by the common law may claim an allowance of all his reasonable costs and expenses.

(2) By bailiff is understood a servant, who has administration and charge of lands, goods, and chattels, to make the best benefit to the owner. Against such bailiff an action of account lies for the profits which he hath raised or made, or might by his industry or care have reasonably raised or made, his reasonable charges and expenses being deducted. An infant shall not be charged on such account. 1 Inst. 172. a.

has received more than his just share. It is not sufficient to charge defendant merely as bailiff (3).

Where there is a running account between a merchant and broker, the proper remedy for recovering the balance is by an action of account and not of *assumpsit*^b.

At the common lawⁱ, executors in general could not have this action for an account to be made to the testator, because the account rested in privity; but the stat. Westm. 2. 13 Edw. 1. stat. 1. c. 23. gave this action to executors, and (according to Sir Edward Coke, 1 Inst. 89. b. 2 Inst. 404.) the statute of 31 Edw. 3. stat. 1. c. 11. (4) to administrators. The stat. 25 Edw. 3. stat. 5. c. 5. has extended the same remedy to the executors of executors.

At the common law, this action did not lie *against* the executors of the accountant (5); but by stat. 4 Ann. c. 16. s. 27. an action of account may be maintained against the

^b Scott v. M'Intosh, 2 Camp, N. P. C. 238. ⁱ Lit. s. 125. 1 Inst. 89. b. 90. b. 2 Inst. 403.

(3) An action of account against a tenant in common on this statute, differs from an action of account against a bailiff at common law; for a bailiff at common law was answerable, not only for his actual receipts, but for what he might have made of the lands without his wilful default: but, by the words of this statute, a tenant in common, when sued as bailiff, is answerable only for so much as he has actually received more than his just share and proportion. Per Willes, C. J. delivering the opinion of the court in *Wheeler v. Horne*, Willes, 209, 210.

(4) This statute empowers the ordinary, in the case of intestacy, to depute the next and most lawful friends of the intestate to administer his goods; which deputies shall have an action to demand and recover, as executors, the debts due to the intestate. See a precedent of a declaration in account by an administrator.—*Vidian's Entries*, p. 75.

(5) These rules of the common law, viz. 1. That account did not lie *by* executors*; 2. That account could not be maintained *against* executors, had some exceptions. As to the first, an account might have been maintained at the common law by the executors of *merchants*; as to both, in the case of the king, the action lay†. It should also be remarked, that though at the common law executors in general were not compellable to account, yet if they consented to settle an account, they were liable to an action of debt for the balance‡.

* Hargrave's Co. Lit. 90. b. n. (3).

† F. N. B. 117. 11 Rep. 90. a.

‡ F. N. B. 267. Lord Hale's note.

executors or administrators of a guardian, bailiff, or receiver.

This action does not lie against an infant^k (6); nor by one executor against another^l, for the possession of the one is the possession of the other.

II. *Of the Pleadings and Evidence.*

THE defendant may plead in bar to this action^m, that he was never bailiff or receiver, or that he has fully accounted, or any matter, which tends to shew that he was never accountable: or a release.

When the plaintiff charges the defendant as receiver from such a time to such a timeⁿ, the defendant must answer the whole time (7). precisely (8).

By stat. 21 Jac. 1. c. 16. s. 3. actions of account (other than such accounts as concern the trade of merchandize between merchant and merchant, their factors; or servants) must be commenced and sued within six years next after the cause of action.

If the defendant plead, that he was never receiver^o, he

^k 1 Inst. 88. b. 1 Inst. 172. a.
^l 1 F. N. B. 271. 4to. edit. note (f).
^m 1. R. A. 121. vet. Intr. 16. Rast.
 Entr. 17. 19. 21.

ⁿ Southcot v. Rider, T. Raym. 57.
^o 2 Roll. Abrid. 639. (F). pl. 1.

(6) Hence an infant cannot be guardian in socage. 1 Inst. 88. b.

(7) It is a general rule in pleading, that the plea must answer every material part of the declaration. If a plea begin with an answer to the whole, but in truth the matter pleaded be only an answer to part, the plea is bad, and the plaintiff may demur; but if the plea begin as an answer to part, and is in truth an answer to part only, it is a discontinuance, of which the plaintiff may take advantage; the plaintiff, however, ought not to demur in this case, but to take his judgment for the part unanswered by *nil dicit*; for if the plaintiff demurs, or pleads over, the whole action is discontinued. 1 Roll's Abrid. 487. pl. 10.—Weeks v. Peach, 1 Salk. 179. Market v. Johnson, 1 Salk. 180.—Vincent v. Beston, 1 Lord Raym. 716.—Peers v. Henriques, 2 Lord Raym. 841.—Gilb. Hist. C. B. 155. 158.

(8) Money cannot be paid into court in this Action, per Willes, C. J. Bull. N. P. 128.

cannot give in evidence a bailment to deliver to another person, and that he has delivered accordingly: for though this special matter prove that he is not accountable, yet, as upon the delivery, he was accountable conditionally, (viz. if he did not deliver over,) the evidence does not support the plea.

So a release cannot be given in evidence under the plea, that the defendant was never receiver^p.

In account against the defendant^q as receiver by the hands of A, it is sufficient for the plaintiff to prove that A directed the defendant to borrow of another to pay the plaintiff; that the defendant borrowed accordingly, and that A gave bond to the lender,

III. Of the Judgment.

1. To account.

2. Final.

1. THERE are two judgments in this action:—the first judgment is, that the defendant do account^r, usually termed a judgment *quod computet* (9). This is in the nature of an award of the court, interlocutory only, and not definitive^s, and whereon a writ of error does not lie. It is, however, essentially necessary that this judgment should be entered^t, for where the defendant pleaded that he had fully accounted, and issue being joined thereon, the jury found for the plaintiff, and assessed damages and costs, and judgment was entered accordingly, and execution taken out; the court, on motion, set aside the judgment and execution, observing that the judgment was wrong, for it ought to

p Willoughby v. Small, 1 Brownl. 24.

q Harrington v. Deane, Hob. 36.

r Co. Ent. 46. b. Rast. Ent. 17.

s Metcalf's case, 11 Rep. 38. a.

t Hughes v. Burgess, Ca. Temp. Hard.

394.

(9) The form of this judgment, in the case of Godfrey v. Saunders, 3 Wils. 88. was as follows:—"therefore it is considered that the defendant account with the plaintiff of the time aforesaid, in which he (defendant) and the said S. S. were the bailiffs of the plaintiff, and had the care and administration of the aforesaid goods and merchandises, &c. to be merchandised and made profit of for plaintiff; and the defendant in mercy, &c. because he hath not before accounted, &c."

have been only a judgment to account; and they compared the irregularity in this case to the irregularity of signing final judgment before interlocutory judgment. After the judgment to account, the defendant usually offers to account, and, thereupon, the court assigns auditors to take and declare the account between the parties. The auditors assigned^a, are, in general, some of the officers (10) of the court, who may convene the parties before them from day to day, until the account is determined. If the auditors find the parties remiss and negligent, they must certify to the court that they will not account. By stat. 4 Ann. c. 16. s. 27. the auditors are empowered to administer an oath, and examine the parties touching the matters in question, and for the trouble in auditing and taking such account, shall have such allowance as the court shall judge reasonable, to be paid by the party on whose side the balance of account shall be.

Special bail is not to be found until after the judgment to account^z (11). If the defendant^y, after the judgment to account, does not personally appear in court to give bail to account, there must issue a *capias ad computandum* for the purpose of bringing him into court.

With respect to pleading before the auditors, the following rules are to be observed: 1. In order to avoid trouble and charge to the parties^x, what might have been pleaded in bar to the action shall not be allowed as a discharge before the auditors. 2. If the party is once chargeable and accountable^a, he cannot plead any matter in *bar*, except a release, or *plene computavit*; but must plead before the auditors. The exceptions proceed on this ground, that a release, and the having fully accounted, are total extinctions of the right of action^b, of which the court is to judge; and even in these cases they must be pleaded specially, and cannot be given in evidence on *ne unques receivor*. 3. No-

^a Williams v. Lee, 1 Mod. 42. See ^z Taylor v. Page, Cro. Car. 116. 3 Wils. the form, 3 Wils. 89. 113. S. P.

^x Reeves v. Gibson, 1 Lev. 300. ^a 3 Wils. 113. 114.

^y Chester v. Hunt, C. B. M. 13 G. 2. ^b 1 Brownl. 24. 25.

(10) In Godfrey v. Saunders, C. B. E. 10 G. 3. 3 Wils. 73. the three prothonotaries were assigned auditors.

(11) It was said by all the prothonotaries in the Court of Common Pleas, that the defendant upon the first writ should not be held to special bail, yet, in special cases, by the discretion of the court, he shall find bail. Noy, 28.

thing can be pleaded before the auditors^c contrary to what has been previously pleaded and found by verdict, because the consequence would be, either two contradictory verdicts, which would perplex the court, or two similar verdicts, which would be nugatory. 4. If the defendant plead, before the auditors^d, any matter in discharge, which is denied by the plaintiff, so that the parties are at issue, the auditors must certify the record to the court, who, thereupon, will award a *venire facias* to try it; and if on the trial the plaintiff make default, he shall be non-suited; but, notwithstanding the non-suit, he may bring a *scire facias* upon the first judgment.

2. The final judgment is^e, that the plaintiff do recover against the defendant so much as he, the defendant, is found in arrear (12). A writ of error lies upon this last judgment only; but, although it be found erroneous, and reversed, the first judgment shall stand in force; for the two judgments are distinct and perfect (13).

IV. Execution.

It is not unworthy of remark, that this action is the first of a civil nature in which process of execution against the person was given. This process is given by stat. Westm. 2. 13 Edw. 1. c. 11.; but, under this act, the guardian in socage cannot be committed to prison, for he is in *loco parentis*, and the words of the statute are *de servientibus, ballivis, &c.*

c 3 Wils. 114.

d Bull. N. P. 128.

e Metcalf's case, 11 Rep. 40. a.

(12) The form of this judgment for the plaintiff upon demurrer to plea before the auditors, in *Godfrey v. Saunders*, 3 Wils. 94. was as follows: "Therefore it is considered, that the plaintiff do recover against the defendant the aforesaid 12,000l. (the sum laid in the declaration) for the value of the goods and merchandises aforesaid, and also 278l. 7s. 9d. for his damages, as well by reason of the interpleading aforesaid, as for his costs and charges by the plaintiff, in and about his suit in that behalf expended, to the said plaintiff by the court here adjudged with his assent; and that the said defendant be in mercy, &c."

(13) The reader, who is desirous of further information concerning the nature of this action, is referred to the record and proceedings in the case of *Godfrey v. Saunders*, 3 Wils. 73.

CHAP. II.

OF ADULTERY.

- I. *Of the Remedy for this Injury, and in what Cases an Action may be maintained.*
 - II. *Of the Venue—Declaration—Plea.*
 - III. *Of the Evidence, and herein of the Marriage Act, 26 G. 2. c. 33.*
 - IV. *Of the Damages.*
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- I. *Of the Remedy for this Injury, and in what Cases an Action may be maintained.*

IN ancient times adultery was inquirable in tourns and leets^a, and punished by fine and imprisonment; but at the present day this offence belongs to the ecclesiastical courts, and the temporal courts do not take any cognizance of it as a public wrong. Several attempts, indeed, have been made by the legislature to bring this offence within the pale of criminal jurisdiction, but they have, for the most part, been wholly ineffectual (1). During the time of the commonwealth, in the year 1650, when, as Blackstone justly remarks^b, the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and

^a 3 Inst. 206.

^b 4 Bl. Com. p. 64.

(1) In the year 1604, (2 James I.) a bill was brought into parliament “for the better repressing the detestable crime of adultery.” This bill was committed, but when the report was made by the committee, the Earl of Hertford said, that they found the bill rather concerned some particular persons than the public good, whereupon the bill was dropped. See 5th vol. of Parl. Hist. p. 88.

purity of morals, adultery was made a capital crime (2). But at the restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigour; adultery, therefore, at the present day, as far as respects the temporal courts, is considered merely as a civil injury; and the only remedy, which the law affords, is an action, whereby the husband may recover, against the adulterer, a compensation (3) in damages for the loss of the society, comfort, and assistance of his wife, in consequence of the adultery.

With respect to the nature of this action, an opinion was hazarded in a former edition of this work, that this action was to be classed among actions on the case; and it was conceived, that this opinion was warranted by the following authorities: First, because it had been adjudged, that the plea of the statute of limitations to this action is, not guilty within six years; and this appears to have been so decided on the express ground, that this was an action on the case; the court observing, that if it were trespass and assault, the wife must have been joined. *Cooke v. Sayer*, B. R. M. 32 G. 2. cited by Wood in *Macfadzen v. Olivant*, 6 East, 388, 389. Secondly, because it had been solemnly determined, that although the damages recovered in this action may be under 40s. yet the plaintiff will be entitled to full costs. *Batchelor v. Bigg*, 3 Wils. 319. 2 Bl. R. 854. S. C. Thirdly, because Mr. J. Grose in *Weedon v. Timbrell*, 5 T. R. 361. had expressed a clear opinion, that this action was considered as an action on the case, and not of trespass, and supported that opinion by an allusion to the preceding decision

(2) The provisions of the statute made for this purpose were these—"that if any married woman should be convicted of being carnally known by any man other than her husband (except in case of ravishment), such offence should be adjudged felony, and every person, as well the man as the woman, offending therein, should suffer death without benefit of clergy, provided that this should not extend, 1st, to any man, who did not know at the time of such offence committed, that the woman was then married; or, 2ndly, to any woman whose husband should be beyond the seas for three years, or reputed dead; or, 3dly, to any woman whose husband should absent himself for three years in any place, so as the wife should not know her husband to be living within that time." See *Scobell's Acts*, Part 2, p. 121. Fo. Ed.

(3) Strictly speaking an injury of this kind will not admit of any, much less a pecuniary compensation.

of *Batchelor v. Bigg*. Fourthly, because in an action for debauching the plaintiff's daughter, the form of which bears a strict resemblance to the action for adultery, it had been holden, that the plaintiff might state that the defendant made an assault on his daughter "on divers days and times," &c. whereas in trespass and assault such an allegation would be bad (6 East, 395); and Mr. J. Buller appears to have formed his opinion, that the plaintiff might so declare, on the ground, that this was an action on the case and not trespass. *Parker v. Ironfield*, B. R. Hil. 19 Geo. 3. cited by Lawrence J. 6 East, 391.

The preceding authorities seemed to warrant the position, that the action for adultery was to be considered as an action on the case; but a late decision in the Court of Common Pleas has considerably shaken, if not wholly overturned, a part at least of the argument on which the position in question was built. The case alluded to is, that of *Woodward v. Walton*, C. B. Trin. 47 Geo. 3. 2 Bos. and Pul. N. R. 476. The court there held, that an action for debauching the plaintiff's daughter *per quod servitium amisit* is an action of trespass, and that consequently a count for that purpose might be joined with a count for breaking and entering the plaintiff's house. Sir J. Mansfield, delivering the opinion of the court, introduced the following remarks:—"A little confusion has arisen in some of the cases from the insertion of the words *vi et armis* in declarations in actions on the case, those words being generally applicable to actions of trespass only; and I certainly do not recollect to have seen them used in actions upon the case. In actions like the present, as far as my recollection goes, the form of the declaration has always been in trespass *vi et armis et contra pacem*. I cannot distinguish between this action and an action for criminal conversation. If that be the subject of trespass, this must be so too. In the action for criminal conversation, the violence is not the ground of the action: both in that case and in this, if the injury were committed with violence, it would amount to a rape. I do not see, therefore, any good reason why either of them should be the subject of an action of trespass. *But it seems from the cases which we have looked into, that the action for criminal conversation has been considered for years as the subject of an action of trespass.* In actions by a master for an assault upon his servant, *per quod servitium amisit*, there is no trespass against the plaintiff; the sole foundation of the action is the loss of service; yet this also has been considered as an action of trespass."

Having endeavoured to explain, or rather to state, the doubts which exist as to the nature of the action, the next object of inquiry is, under what circumstances the law permits this action to be maintained; and first, it is essentially necessary, that the husband should present himself in court, with clean hands, as has been said, that is, without any imputation of having courted his own dishonour, or having been instrumental to his own disgrace; for it is now settled^c, that if the husband has consented to, or provided means for the adulterous intercourse of his wife with the defendant, the ground of the action is removed, and the defendant will be entitled to a verdict; for *volenti non fit injuria* (4). So if the husband, after marriage, transgresses those rules of

c Per de Grey, C. J. in *Howard v. Burtonwood*, C. B. Middx. Sitt. after T. T. 16 Geo. 2. Agreed by the court

in *Duberley v. Gunning*, 4 T. R. 651. and there said by Buller J. to be settled law.

(4) From Lord Kenyon's account of *Cibber v. Sloper*, in 4 T. R. 655, it would appear as if the verdict in that case had been given in conformity with this position. But, in fact, the jury in *Cibber v. Sloper* found a verdict for the plaintiff with 10l. damages. The cause was tried before Lee C. J. at the Middlesex sittings after Michaelmas term, 1738: Strange, solicitor-general for the plaintiff; Mr. Murray (afterwards Lord Mansfield) and other counsel, for the defendant. The case is truly stated in Buller's N. P. p. 27, as follows: "In *Cibber v. Sloper*, it was holden, that the action lay, though the privity and consent of the husband to the defendant's connexion with the wife were clearly proved." The clear proof here alluded to was this—that the plaintiff and defendant lived in the same house; that their bed-chambers were adjoining to each other; and that there was a communication between them by a door. Mrs. Cibber used to undress herself in her husband's room, and leave her clothes there, and putting on a bed-gown, retired to Mr. Sloper's room with one of the pillows taken from her husband's bed, Mr. Cibber shutting the door after her, and wishing her good night. It was proved also, that Mr. Cibber sometimes called Mr. Sloper and Mrs. Cibber up to breakfast. It is observable, that Lord Kenyon, at a time subsequent to that above-mentioned, viz. on the first trial of *Hoare v. Allen*, Middlesex sittings after M. T. 41 G. 3. MSS. stated this case correctly with the exception of the name of the Chief Justice. Lord Kenyon then said, "that *Cibber v. Sloper* was tried before Lord Mansfield, (Lee was Chief Justice) who thought the conduct of the husband so gross, that it was a case for small damages, but that it did not go to the ground of the action; since that time, however, it had been thought, that where the husband furnished means for the criminal intercourse, the action would not lie."

conduct which decency requires^d, and affection demands from him, and in an open, notorious, and undisguised manner, carries on a criminal correspondence with other women, he cannot maintain this action (6).

So if the wife be suffered to live as a prostitute^e with the privity of the husband, and the defendant has thereby been drawn in to commit the act of which the husband complains, the action cannot be maintained (7). But if the husband has been guilty of negligence merely, or inattention to the behaviour and conduct of his wife with the defendant^f, not amounting to a consent, such circumstance will go in mitigation of damages only.

In an action for adultery with the plaintiff's wife^g, it appeared that the plaintiff and his wife had agreed to live separately: the plaintiff proved several acts of adultery committed by the defendant after the separation of the plaintiff and his wife, but there was not any direct proof of adultery *before* the separation. Lord Kenyon, C. J. being of opinion, that the gist of the action was the loss of the comfort and

^d Wyndham v. Lord Wycombe, 4 Esp. N. P. C. 16. and Sturt v. Marq. of Blandford, there cited, both ruled by Kenyon, C. J. (5).

^e Per Lord Mansfield, C. J. in Smith

v. Allison, Bull. N. P. 27. Hodges v. Windham, Peake, N. P. C. 39.

^f Agreed by the court in Duberley v. Gunning, 4 T. R. 651.

^g Weedon v. Timbrell, 5 T. R. 357.

(5) It is to be observed, that although the opinion of Lord Kenyon, C. J. as delivered in Sturt v. Marq. of Blandford, coincided with the position in the text, yet the jury in that case found a verdict for the plaintiff, with 100*l.* damages.

(6) Lord Alvanley, C. J. differed in opinion with Lord Kenyon on this point: Lord A. thought that the infidelity or misconduct of the husband could not be set up as a legal defence to the adultery of the wife; that circumstance alone which struck him as furnishing any defence was, where the husband was accessory to his own dishonour; in that case he could not complain of an injury which he had brought on himself, and had consented to; but that the wife had been injured by the husband's misconduct, could not warrant her in injuring him in that way, which was the keenest of all injuries. In a case of this kind, therefore, (Bromley v. Wallace, 4 Esp. N. P. C. 237.) Lord Alvanley directed the jury to consider evidence of infidelity in the husband, as going in mitigation of damages only, and not as furnishing an answer to the action, or as entitling the defendant to a verdict.

(7) "If the wife is a prostitute, and the husband is *not* privy to it, it goes only in mitigation of damages." Per de Grey, C. J. in Howard v. Burtonwood, and Buller's N. P. 27. S. P.

society of the wife, which was alleged in the declaration in the usual manner, but was not supported by the evidence, nonsuited the plaintiff. On a motion for a new trial, the court concurred in opinion with the chief justice.

In a recent case^h, where the husband and wife had entered into a deed of separation with trustees, and the wife was living separate from the husband, though not in pursuance of the terms of the deed, at the time of the adulterous intercourse, Lord Ellenborough, C. J. said that he did not consider the question, "whether the mere fact of separation between husband and wife by deed, was such an absolute renunciation of his marital rights, as prevented the husband from maintaining an action for the seduction of his wife," as concluded by the preceding decision in *Weedon v. Timbrell*. But in the case then before the court, the court being of opinion, that taking the whole deed into consideration, it was evident, that the only separation in the contemplation of the parties, was a separation *with the approbation of the trustees*; and that, as the wife had left the husband without such approbation, she was not at the time of the adulterous intercourse living separate from the husband *by his consent*, and consequently the event and situation provided for in the deed had not happened; and in that view of the case, there could not be any question, but that the plaintiff's right to recover was not affected by the deed; and further, if the wife had left the husband with the approbation of the trustees, yet, as the deed had provided "that the wife might have the care of the younger children of the marriage, and visit the others, more especially when they should be ill, so as to require the attention of a mother," the husband had not in this case (as it was holden that he had done in the case of *Weedon v. Timbrell*) given up all claim to the benefit to be derived from the society and assistance of his wife; consequently, that the case of *Weedon v. Timbrell*, allowing it the fullest effect according to the terms of it, could not be considered as an authority against the plaintiff in this action.

Where several defendants have carried on an adulterous intercourse with the plaintiff's wife, the plaintiff may maintain separate actions, although the cause of action has accrued during the same periodⁱ.

^h *Chambers v. Caulfield*, 6 East's Rep. 244.

ⁱ *Gregson v. M^cTaggart*, 1 Camp. N. P. C. 415.

II. *Of the Venue—Declaration—Plea.*

THIS is a transitory action; and, consequently, the venue may be laid in any county, subject, however, to being changed, upon the usual affidavit, that the whole cause of action arose in another county, and not elsewhere out of such other county. Although the marriage be a material inducement to the right of the plaintiff, to maintain the action in respect to the trespass on the wife, yet it forms no part of the cause of action: the trespass committed on the wife constitutes the whole cause of action^k.

The declaration in this action is very concise; in substance it is as follows: viz. that the defendant, *with force and arms*, made an assault on the wife of the plaintiff, and debauched and carnally knew her, whereby the plaintiff wholly lost and was deprived of the comfort, society, and fellowship of his wife, and of her aid and assistance in his domestic affairs, and other lawful business.

The general issue in this action is, not guilty.

The statute of limitations (8) may be pleaded in bar of this action; but the gist of the action being the injury sustained by the husband in consequence of the adultery, the proper plea under that statute is, not guilty within six years^l.

In a late case^m where the plaintiff complained “of a plea of trespass, that the defendant with force and arms assaulted and seduced the plaintiff’s wife, *per quod consortium amisit, &c. contra pacem, &c.*” and the defendant pleaded not guilty within six years; on general demurrer, a question arose, whether the action was trespass or case. *Cooke v. Sayer*

^k *Guard v. Hodge*, 10 East, 32.

^l *Cooke v. Sayer*, 6 East’s Rep. 388.

² Burr. 753. Bull. N. P. 28.

^m *Macfadzen v. Olivant*, 6 East’s Rep. 387.

(8) By stat. 21 Jac. 1. c. 16. s. 3. all actions on the case (other than for slander) must be commenced and sued within six years next after the cause of such action; and actions of trespass, of assault, battery, wounding, and imprisonment, within four years. It appears, from the language of the court in *Cooke v. Sayer*, 6 East’s R. 388. that they considered the action for adultery as falling within the former description of actions, and consequently that the limitation of time was six years.

was cited. Lord Ellenborough C. J. said, it might be material to consider that point, if the question were, whether the limitation of six or four years *only* applied to this case; but the defendant having taken the longer period, and pleaded not guilty within six years, that of course must include not guilty within four years, and the plea not having been specially demurred to, was therefore good in either way of considering it; he added further, that he did not know what his opinion would have been if the point had then first arisen; but it having been considered in *Cooke v. Sayer*, as an action on the case, he should be inclined so to consider it. Lawrence J. cited the case of *Parker v. Ironfield*, in which Buller J. had considered an action of a similar nature for the seduction of a daughter, *per quod servitium amisit*, as an action on the case. Le Blanc J. did not give any opinion as to this point; but observed, that the action before the court, be it either case or trespass, was within the statute of limitations; therefore, in either way of considering it, the plea was a good bar [not being specially demurred to].

III. *Of the Evidence, and herein of the Marriage Act, 26 G. 2. c. 33.*

In *other actions*, evidence of cohabitation, general reputation, acknowledgment of the parties, and reception by their friends, is sufficient to establish the relation of husband and wife. But in *this action*, in order that it may not be converted to bad purposes, by persons giving the name and character of wife to women to whom they are not married, it has been holden to be indispensably necessary for the plaintiff to prove the marriage ceremony having been performed, either by the testimony of some person who was present at the marriage, or by the production of the register, or of an examined copy thereof^a.

Such strictness being required as to the proof of marriage in this action, it will be necessary to make some remarks touching marriage in general, in order that the reader may be apprised of the solemnities which the law deems essential to constitute a valid marriage.

^a *Morris v. Miller*, 4 Barr. 9057. and Bull. N. P. 27. and per Lord Mans-

field, C. J. in *Birt v. Barlow*, Doug. 174. S. P.

At the common law^a, any contract made *per verba de præsenti*, or in words of the present, or in case of cohabitation, *per verba de futuro* also, between persons able to contract, was deemed a valid marriage to many purposes, and the parties might have been compelled in the spiritual courts to celebrate it *in facie ecclesiæ*. In order to constitute a valid marriage, before the marriage act, it appears to have been wholly immaterial whether the ceremony was performed by a protestant or a Roman catholic priest, in a private lodging or a public chapel. In the case of the King v. Fielding, 5 St. Tr. 614. the marriage ceremony was performed in a private lodging by a Roman catholic priest, in the year 1705; and upon evidence that the prisoner, in answer to the question whether he would have the woman for his wedded wife, said that he would; and that the woman answered affirmatively to the question put to her, whether she would have Mr. Fielding for her husband; Mr. Justice Powel, upon a question of felony, considered it as a marriage contracted *per verba de præsenti*; in like manner as it was considered by Lord Holt in Jesson v. Collins, Salk. 487. and 6 Mod. 155. See further on this subject R. v. Brampton, *post* n. (15). It appears doubtful, whether, at the common law, it was necessary that the ceremony should have been performed by a person in holy orders; (see the argument in R. v. Luffington, 1 Burr. S. C. 232. and some remarks on this point, 1 Bl. Com. 439.) certainly the ecclesiastical law required it, and if a husband demanded a right in the ecclesiastical court, which was only due to him by the ecclesiastical law, it was necessary for him to prove in that court, that he had been married by a person in holy orders. Haydon v. Gould, Salk. 119. Having endeavoured to explain the rules of law which prevailed, prior to the marriage act, it becomes necessary to set forth the provisions of that important statute, in order that the reader may obtain an accurate knowledge of the alterations, which have been made in the law on this subject.

From the preamble of this statute^b (sometimes termed Lord Hardwicke's Act, but more frequently the marriage act) it appears to have been made for the purpose of preventing the mischiefs and inconveniences, which had arisen from clandestine marriages. The provisions are as follow:

First, all banns shall be published in the parish church^c, or in a *public chapel in which banns have been usually pub-*

^a See R. v. Inhabitants of Brampton,
10 East, 282.

^b Stat. 26 Geo. 2. c. 33.
^c S. 1.

lished (9), belonging to the parish or chapelry wherein the persons to be married reside, upon three Sundays preceding the marriage; and if the parties dwell in different parishes or chapelries, then the banns are to be published in the

(9) Upon these words a question arose, in the year 1781, whether this statute was to be construed to mean such chapels, wherein banns were usually published at the time when the marriage in question took place, or such chapels only as existed at the time of passing the act. The Court of King's Bench were of opinion, that the legislature clearly meant chapels existing at the time of the act; and, consequently, that a marriage, celebrated in a chapel erected since the statute 26 Geo. 2. c. 33. was void, although banns had been frequently published there, and marriages *de facto* celebrated there previously to the marriage in question. *R. v. Inhabitants of Northfield*, Doug. 658. As soon as the determination of the court in this case was known, Lord Beauchamp introduced a bill into parliament, which passed into a law, for making all marriages, which *had been* celebrated in any parish church or public chapel, erected since stat. 26 Geo. 2. c. 33. and consecrated, valid in law, and to exempt the clergymen, who had celebrated such marriages, from the penalties of that statute. *Vide* 21 Geo. 3. c. 53. The operation of the stat. 21 Geo. 3. c. 53. not being prospective, a similar provision was made by stat. 44 Geo. 3. c. 77. in respect of marriages solemnized before the 25th of March, 1805, in any church or public chapel in England, &c. erected since the making the statute 26 Geo. 2. and consecrated; and in like manner as by the last-mentioned act (21 G. 3. c. 53. s. 3.) registers of these marriages or copies thereof are to be received in evidence in courts of law and equity: *provided*, that in all such courts the same objections shall be available to the receiving such registers or copies in evidence, as would have been available to the receiving the same as evidence, if such registers or copies had related to marriages solemnized in parish churches or public chapels, in which banns were usually published before or at the time of passing the act 26 G. 2. And by stat. 48 G. 3. c. 127. the same provisions have been made in respect of marriages solemnized before August, 23d, 1808, in any church, &c. with this farther enactment, "that the registers of all marriages solemnized in any public chapels, thereby enacted to be valid, shall, within thirty days next after the 23d of August, 1808, be removed to the parish church of the parish in which such chapel shall be situated; and, in case such chapel shall be situated in an extra-parochial place, then to the parish church next adjoining, to be kept with the marriage registers of such parish, and in like manner as parish registers are directed to be kept by stat. 26 Geo. 2.; and within 12 months after the removal of such registers to such parish churches respectively, two copies thereof respectively shall be transmitted by the respective churchwardens of such parishes to the bishop of the diocese, or his chancellor, subscribed by

church or chapel belonging to the parish or chapelry, where in *each* of the persons dwell; if both or either dwell in an extra-parochial place having no church or chapel, then the banns are to be published in a church or chapel belonging to the adjoining parish, and in such case the clergyman shall certify the publication in the same manner as if either of the parties dwelt in such parish: and, further, it is required, that the marriage shall be solemnized in one of the parish churches or chapels, where the banns have been published.

Notice shall be given^r to the minister, of the names, places of abode within the parish, &c. and time of residence there, of the parties seven days before the publication of the banns; otherwise the minister shall not be obliged to publish them.

No minister^r shall be punishable by ecclesiastical censures for solemnizing marriages, where both or one of the parties are under 21, after banns published, if the parents or guardians (whose consent is required by law) do not give notice of their dissent; if, however, such parents or guardians, or one of them, publicly declare their dissent at the time of publication, then the banns will be void.

Licences shall be granted^t to solemnize marriages in the church or chapel of the parish or chapelry only, within which the usual place of abode of one of the parties shall have been for four weeks before the marriage; or where both or either of the parties dwell in an extra-parochial place, then in the church or chapel of the adjoining parish or chapelry (10). N. Parishes, having no parish church or

r S. 2.

s S. 3.

t S. 4.

the hands of the minister and churchwardens, to the end that the same may be faithfully preserved in the registry of the bishop.”

N. In cases where the marriage has been solemnized in a chapel, the plaintiff ought to be prepared with the registers and other evidence, to show that banns are and have been usually published there; in order to found a presumption, that it is a chapel in which marriages may be lawfully solemnized according to the provisions of the marriage act. But in *Taunton v. Wyborn*, 2 Camp. N. P. C. 297. it was holden *prima facie* sufficient for this purpose to produce an old register of marriages solemnized in the chapel before the passing of the marriage act, and a register of banns published there since, and to prove, by living witnesses, that marriages had been solemnized and banns published there of late years.

(10) Notwithstanding the provisions in the 2d section, and in this section, as to the residence of the parties, it is to be observed, that

chapel^a, or none where divine service is usually celebrated every Sunday, are deemed extra-parochial.

The archbishop of Canterbury's right of granting^x special licences to marry at any convenient time or place is expressly reserved to him.

Persons convicted of solemnizing matrimony^y in any other place than a church or public chapel, where banns have been *usually published* (11), except by special licence, or of solemnizing matrimony without publication of banns, except by licence from persons duly authorised to grant the same, are to be deemed guilty of felony, and shall be transported for 14 years; the prosecutions for such felony having been commenced within three years after the offence committed; and *all marriages solemnized after 25th March, 1754, in any other place than a church, or such public chapel, unless by special licence, or solemnized without publication of banns or licence from a person duly authorized to grant the same, shall be void.*

After the solemnization^z of any marriage by banns, it shall not be necessary, in support of such marriage, to give any proof of the actual dwelling of the parties in the respective parishes wherein the banns were published; or where the marriage is by licence, it shall not be necessary to give any proof that the usual place of abode of one of the parties, for the space of four weeks, was in the parish where the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary in any suit touching the validity of such marriage.

"All marriages solemnized^a by *licence*, where either of the parties, not being a widower or widow, is under the age of 21 years, without the consent of the father of such of the parties so under age (if then living) first had, or if dead, of the guardian of the person of the party so under age, lawfully appointed, or one of them: and if there be no such guardian, then of the mother (if living and unmarried); or if there be no mother living and unmarried, then of a guardian of the person appointed by the Court of Chancery, shall be void."

^a S. 6.

^x S. 5.

^y S. 8.

^z S. 10.

^a S. 11.

after the solemnization of any marriage, either by banns or licence, it is not necessary, in support of such marriage, to give any proof of the residence of the parties, nor is evidence to the contrary admissible. See the 10th section of this statute.

(11) See note 9.

An illegitimate child has been holden to be within the meaning of this clause (*R. v. Hodnett*, 1 T. R. 96.) Whether the consent of the putative father, or of the natural mother be sufficient to give validity to the marriage of such child, appears to have been a *veraxata quæstio*. In *R. v. Edmonton*, B. R. E. 24 G. 3. 2 Bott. 76, pl. 114, and cited in 1 T. R. 97, it was holden that the consent of the putative father was sufficient; but in *Horner v. Lydiard*, and *Daniel v. Cooke*, Sir William Scott was of opinion, that the consent could only be given by a guardian appointed by the Court of Chancery. The same question was submitted to the consideration of the Court of King's Bench, in a late case of *Priestley v. Hughes*, sent by the master of the rolls. After the case had been twice argued, three judges, viz. Lord Ellenborough, C. J. Le Blanc, and Bayley, Js. certified^b, that they were of opinion, that all marriages, whether of legitimate or illegitimate persons, are within the general provision of this statute, and that the consent of the natural mother is *not* a sufficient consent within the preceding section. Grose J. certified, that it seemed to him from the words of the 11th section, that the legislature had in their contemplation such legitimate children who had, or might have, either parents to consent to the marriage of such children, or guardians, whom the legislature intended to substitute for such parents, under different circumstances; and that they had not in their contemplation to provide for the marriages of illegitimate children, whose parents could not legally forbid the banns, if they were to be married by banns, and who could have no such parents as are intended to be described in the 11th section, i. e. legitimate parents, if they were to be married by licence.

The 12th section, contemplating the possibility of the guardian or mother of the parties being *non compos mentis*, or in parts beyond the seas, or that they may be induced unreasonably, or by undue motives, to abuse the trust reposed in them, enacts, that in such cases the party desirous of marrying may apply, by petition, to the chancellor, lord keeper, or lords commissioners of the great seal, who may proceed in a summary way; and if the marriage proposed shall appear to be proper, may, by order of court, declare the same to be so, and such order shall be as good as if the guardian or mother of the party petitioning had consented to such marriage.

No suit^c or proceeding shall be had in any ecclesiastical

^b 11 East, 20.

^c S. 13.

court, in order to compel a celebration of any marriage *in facie ecclesiæ*, by reason of any contract of matrimony, whether *per verba de præsentī*, or *per verba de futuro* (12).

“The church^d and chapel wardens of every parish or chapel shall provide proper books, in which all marriages and banns of marriages respectively, there published or solemnized, shall be registered (every page of which is to be regularly numbered and lined at proper distances, in the manner therein mentioned,) and shall respectively be signed by the parson, vicar, minister, or curate, or by some other person in his presence, and by his direction; and all such books shall belong to every such parish or chapel, and be kept for public use.”

In order to preserve^e the evidence of marriages, and to make the proof thereof more certain and easy, “all marriages shall be solemnized in the presence of two or more witnesses, besides the minister; and immediately after such celebration an entry thereof shall be made in such register, in which it shall be expressed, that the marriage was by banns or licence; and if both or either of the parties married by licence be under age, with consent of the parents or guardians, and shall be signed by the minister with his proper addition, and also by the parties married, and attested by such two witnesses,” which entry is directed to be in the form, or to the effect therein set forth. N. An omission in the entry will not affect the validity of the marriage. R. v. St. Devereux, Burr. Set. Cases, 506. 1 Bl. R. 367. S. C.

Persons convicted^f of knowingly and wilfully inserting a false entry in the register of any thing relating to any marriage, with intent to elude the force of the act, or of falsely making, altering, forging, or counterfeiting, or of assisting in falsely making, &c. such entry, or of falsely making, &c. any licence, or of publishing as true any false, &c. register or copy thereof, or any false, &c. licence, knowing such register or licence to be false, &c. or of wilfully destroying any register of marriages, or any part thereof, with intent to avoid any marriage, or to subject any person to the penalties of this act, shall be guilty of felony without benefit of clergy.

Lastly, it is provided, that this act shall not extend to any of the marriages of any of the royal family; or to Scot-

^d S. 14.

^e S. 15.

^f S. 16.

(12) See the common law on this point, ante p. 16.

land (13), or to marriages among Quakers or Jews (14), where both the parties are Quakers or Jews (15), or to marriages beyond the seas (16).

(13) Scotland being excepted, the intention of the statute, so far as it provided for annulling the marriages of minors without the consent of parents or guardians, has been frequently evaded by going into Scotland to be married there, and returning into England immediately afterwards. The validity of these Scotch marriages appears to have been established by a decision of the Court of Arches, which was afterwards confirmed in the Court of Delegates. See Hargrave's note to Co. Litt. 79. b. n. (1.)

(14) It seems, that to prove a Jewish marriage, it is not sufficient to produce witnesses, who were present at the ceremony in the synagogue; because that is merely a ratification of a previous written contract—such contract, therefore, must be adduced and proved. *Horn v. Noel*, 1 Camp. N. P. C. 61. A Jewess may give parol evidence of her own divorce in a foreign country according to the ceremony and custom of the Jews there. *Ganer v. Lady Lanesborough*, Peake's N. P. C. 17. Lord Kenyon, C. J.

(15) It will be observed, that Anabaptists are not excepted. A case occurred before this act took effect, where the plaintiff, in an action for adultery, was an Anabaptist. Denison J. held, that as this is an action against a wrong doer, and not a claim of right, it was sufficient to prove the marriage according to the plaintiff's form of religion. *Woolston v. Scott*, Norfolk Lent Ass. 1753, coram Denison, J. Verdict for the plaintiff—Damages 500*l.* Bull. N. P. 28.

(16) A soldier on service with the British army in St. Domingo, in 1796, being desirous of marriage with the widow of another soldier, who had died there in the service, and both parties being desirous of celebrating their marriage with effect, they went to a chapel in a town where they were, and there the ceremony was performed by a person appearing there as a priest, and officiating as such; the service being in French, but interpreted into English by one who officiated as clerk; and which the woman understood at the time to be the marriage service of the church of England. After this they cohabited together as man and wife for 11 years, until the death of the husband. On a question as to the settlement of the woman, a doubt was raised whether the marriage was valid. The Court of B. R. were clearly of opinion, that it was a valid marriage, whether it was to be considered as a marriage celebrated in a place where the law of England prevailed, or as a marriage according to the law of St. Domingo, whatever that might be. Upon the former ground, inasmuch as there was a contract *per verba de præsenti*, which contracts were binding on the parties before the marriage act (which statute did not affect the present case, this being a marriage beyond the seas, and con-

Having thus detailed the several provisions of this most important statute, I shall resume the subject under discussion, namely, the evidence necessary to support the action for adultery.

In cases where the marriage is to be proved by the production of the register, or an examined copy, proof must also be adduced, if required, of the identity of the parties. In the case of *Birt v. Barlow*, Doug. 170. where a copy of the register was proved as evidence of the marriage, Blackstone J. was of opinion, that the plaintiff ought to go further, and prove the identity of the parties, and that such identity must be proved by the minister, or one of the subscribing witnesses to the register, unless their not being produced was accounted for in the same manner as was required in the case of subscribing witnesses to a deed; and, for want of this proof, the plaintiff was nonsuited. The Court of King's Bench set aside the nonsuit, admitting, however, that the copy of the register was not sufficient to prove the identity, but conceiving that in this case the minister and subscribing witnesses were not the only competent witnesses to prove the identity. And Buller J. observed, that it was not necessary to produce the original register, and that it was only where *that* was required, that subscribing witnesses must be called; that in this case the wife's maiden name was Harriot Champneys; and supposing a maid servant had proved, that she always went by that name till the day of the marriage; that she went out that day, and on her return and ever since had been called Mrs. Birt, that would have been evidence of the identity.

The books of the fleet are not evidence of a marriage, either before the marriage act or since. So ruled by Kenyon, C. J. in *Reed v. Passer*, Peake's N. P. C. 231. 1 Esp. N. P. C. 218. S. C. S. P. per de Grey, C. J. in *Howard v. Burtonwood*, Middlesex Sittings after Trin. Term, 16 G. 3. and previously by Lord Hardwicke, and recently by Le

sequently within the exception), and because the marriage was celebrated by a person who publicly assumed the office of a priest, and appeared habited as such. Upon the latter ground, because upon the facts stated, every presumption must be made in favour of its validity, according to the law of the country where it was celebrated, the marriage ceremony having been performed there in a proper place, and by a person officiating as one competent to perform that function, and more especially as it had been followed by a cohabitation between the parties as man and wife for 11 years. *R. v. the inhabitants of Brampton*, 10 East, 282.

Blanc, J. in *Cooke v. Lloyd*, Salop, Summer Assizes, 1803, Peake's Evidence, Append. xxxvi. But in *Doe dem. Passingham v. Lloyd*, Salop, Summer Assizes, 1794, Heath, J. admitted these books in evidence. See further on the subject of these books, *Lloyd v. Passingham*, 16 Vesey, 59.

The confession of the wife is not evidence against the defendant; but conversations between her and the defendant may be given in evidence^g. So letters written to her by the defendant are evidence *against* him; but the wife's letters to the defendant are not evidence *for* him.

In a modern case, where the plaintiff and his wife were servants^h, and necessarily living apart in different families, Lord Kenyon, C. J. was of opinion, that letters written by the wife to the husband, before any suspicion of the adultery, might be read as evidence of the connubial affection which subsisted between the plaintiff and his wife, observing, at the same time, that, before he admitted the letters to be read, he should require strict proof when, and under what circumstances they were written, in order to shew that at this time there was not any suspicion of misconduct in the wife.

In *Hoare v. Allen*ⁱ, a witness was called by the husband to prove the representation made by the wife to him of the place to which she was going previously to her elopement, in order to remove all suspicion of connivance on the part of the husband. The Court of King's Bench were of opinion, that this evidence being part of the *res gestæ*, was therefore admissible,

IV. Of the Damages.

THE damages given by the jury in this action are, in general, proportioned to the degree of the injury. Circumstances of aggravation of the injury, and which may therefore operate as an inducement with the jury to give large damages, are, the plaintiff's having lived happily with his wife before her connection with the defendant^k, the unblemished character, and antecedent virtuous behaviour of the

^g *Baker v. Morley*, M. D. London Sit-
tings, 30 June, 1741, Lee Ch. J. spe-
cial jury. Verdict for defendant.
Bull. N. P. 28. S. C.

^h *Edwards v. Crock*, 4 Esp. N. P. C.
39. Kenyon, C. J.

ⁱ *Hoare v. Allen*, 3 Esp. N. P. C. 276.

^k Bull. N. P. 27.

wife, a provision having been made for the children of the marriage by settlement or otherwise, and other similar topics which the extraordinary circumstances of the individual case may furnish. Proof is frequently adduced of the defendant being a man of fortune, by calling his banker, or producing a settlement, under which he may be entitled to any estate, real or personal.

Circumstances of extenuation, on the part of the defendant, and which may tend to the mitigation or diminution of the damages are, the plaintiff's ill usage, or unkind treatment of his wife, evidence of his intolerable ill temper, of his having turned his wife out of his house^l, and refused to maintain her, &c. previously to the adulterous intercourse; gross negligence or inattention of the plaintiff to his wife's conduct, with respect to the defendant^m; the wanton manners of the wife, or first advances made by her to the defendantⁿ; a prior elopement of the wife and criminal correspondence with another person, or having had a bastard before marriage^o; letters written by the wife to the defendant, before his connection with her, soliciting a criminal intercourse^p, &c. But the defendant will not be permitted to prove acts of misconduct of the wife subsequent to the commission of the act complained of in the action^q.

Although the damages recovered are under forty shillings, yet the plaintiff shall be entitled to full costs^r; this action not being within the statute 22 and 23 Car. 2. c. 9. (17.)

It has been supposed, that in this action a new trial cannot be granted for excessive damages^s; but in the case of *Chambers v. Caulfield*, 6 East, 256, Lord Ellenborough, C. J. delivering the opinion of the court said, that if it appeared to them, from the amount of the damages given, as compared with the facts of the case laid before the jury, that the jury must have acted under the influence, either of undue motives, or some gross error or misconception on the subject, the court would think it their duty to submit the question to the consideration of a second jury.

^l Bull. N. P. 27.

^m Per Bull. J. in *Duberley v. Gunning*, 4 T. R. 657.

ⁿ Per Lord Ellenborough C. J. in *Gardiner v. Jadis*, March 2, 1805, London Sittings.

^o *Roberts v. Malston*, Hereford, 1745, per Willes, C. J. Gilb. Evid. 113. Ed. 1761.

^p Per Lord Kenyon, C. J. *Elsam v. Fawcett*, 2 Esp. N. P. C. 562.

^q Per Lord Kenyon, C. J. S. C.

^r *Batchelor v. Bigg*, 3 Wils. 319. 2 Bl. R. 364. S. C.

^s See *Wilford v. Berkeley*, 1 Burr. 609. *Duberley v. Gunning*, 4 T. R. 651.

- I. *Of the Nature of an Assault and Battery, and in what Cases an Action for an Assault and Battery may be maintained.*
- II. *Of the Declaration.*
- III. *Of the Pleadings.*
- IV. *Of the Verdict and Judgment.*
- V. *Of the Costs.*

AN assault is an attempt, with force or violence, to do a corporal injury to another, as by holding up a fist in a menacing manner^a; striking at another with a cane or stick, though the party striking misses his aim; drawing a sword or bayonet; throwing a bottle or glass with intent to wound or strike; presenting a gun at a person who is within the distance to which the gun will carry; pointing a pitchfork at a person who is within reach^b; or by any other similar act, accompanied with such circumstances as denote at the time an intention (1), (coupled with a present ability) of using

(1) Whether the act shall amount to an assault, must in every case be collected from the intention. Trespass for assault: Plea, *son assault demesne*. Replication, *de injuriâ suâ propriâ*. The defendant and another person were fighting, and the plaintiff came

actual violence against the person of another. For an assault, which is considered as an inchoate violence, the law has provided a remedy by an action of trespass *vi et armis*, at the suit of the injured party, for the recovery of damages commensurate to the injury sustained (2).

A *battery*, which always includes an assault^c, is an injury inflicted on the person by beating, either with the hand or an instrument. The form of action prescribed by law, in the case of battery, is the same as that in assault, viz. an action of trespass *vi et armis*. In order to maintain this action, it is immaterial, whether the act of the defendant be wilful or not (3). Hence this action lies against a soldier who hurts one of his comrades while they are exercising, unless the defendant can shew such circumstances as will make it appear to the court, that the injury done to the plaintiff was inevitable^d, and that the defendant was not chargeable with any negligences: the merely pleading that the defendant committed the injury *casualiter et per infortunium et contra voluntatem suam* is not sufficient, for no man shall be excused of a trespass, unless it may be judged utterly without his fault.

The defendant was uncocking a gun^e, and the plaintiff

^c Termes de la ley Battery, Com. Dig. Battery.

^d Weaver v. Ward, Hob. 134.

^e Underwood v. Hewson, Str. 596.

and took hold of the defendant by the collar, in order to separate the combatants, whereupon the defendant beat the plaintiff. The plaintiff's counsel offering to enter into this evidence, it was objected on the other side, that the plaintiff ought to have replied this matter specially; but Legge, Baron, over-ruled the objection, observing, that the evidence was not offered by way of justification, but for the purpose of shewing that there was not any assault, for it was the *quo animo* which constituted an assault, which was matter to be left to a jury.—Griffin v. Parsons, Gloucester Lent Assizes, 1754. MSS.

(2) For the law relating to indictments for assault and battery, see 1st Hawk. P. C. ch. 62. s. 1. 2. 1st East's P. C. ch. 8. s. 1. It must be observed, that the party injured may proceed against the defendant by action and indictment for the same assault, and the court, in which the action is brought, will not compel the plaintiff to make his election, to pursue either the one or the other; for the fine to the king, upon the criminal prosecution, and the damages to the party, in the civil action, are perfectly distinct in their natures.—Jones v. Clay, 1 Bos. and Pul. 191.

(3) Neither does the degree of violence with which the act is done make any difference. Per Le Blanc J. 3 East's Rep. 602.

standing near, it went off, and wounded him : it was holden, that the plaintiff might maintain trespass.

This action lies not only against him who commits the injury, but against him also at whose command it is done^f: hence if A command B to beat another person, and B does it accordingly, A is guilty of the trespass as well as B. Although the plaintiff declares for an assault and battery, yet he may recover for the assault only^g.

Although a person has been indicted for a felonious assault, by stabbing, and *acquitted*, the party injured, may, notwithstanding, sue him for damages in a civil action, if there has not been any collusion in procuring the acquittal^h; and the same rule holds after indictment and *conviction*ⁱ.

II. *Of the Declaration.*

THIS is a transitory action^k, and consequently the venue may be laid in any county^l, except where it is otherwise directed by statute; as, where the action is brought against justices of the peace, mayors, or bailiffs of cities, or towns-corporate, head-boroughs, port-reves, constables, tithing-men, churchwardens, overseers of the poor, &c. or *other* persons acting in their aid and assistance, or by their command, for any thing done in their official capacity; in these cases, the venue, by stat. 21 Jac. 1. c. 12. s. 5. must be laid in the county where the facts were committed; otherwise the jury, who try the cause, shall find the defendant not guilty, without any regard to any evidence given by the plaintiff touching the trespass, battery, &c.

The provisions of the preceding statute having been found to be salutary, they have, by a late statute, (42 G. 3. c. 85. s. 6.) been extended to all persons holding a public employment, or any office, station, or capacity, civil or military, either in or out of the kingdom, and who, by virtue of such employment, have power to commit persons to safe custody; provided that, where any action shall be brought against such persons in this kingdom for any thing done out of this kingdom, the plaintiff may lay the act to have been done

^f 1 Roll. Abrid. 555. (V) pl. 2.

^g Lib. Ass. Anno 22. fol. 99. pl. 60.

Bro. Trespass, pl. 40.

^h Crosby v. Leng, 12 East, 409.

ⁱ Adm. per Cur. S. C.

^k Litt. Sect. 485.

^l Corbett v. Barnes, Cro. Car. 444.

in Westminster, or in any county where the defendant shall reside.

Actions brought against any persons for any thing done by any officer of the excise^m or customsⁿ, or others acting in their aid, in execution, or by reason of their office, must be laid and tried in the county where the facts were committed.

The day is not material^o, neither is the defendant obliged to prove that the fact was committed on the day laid in the declaration. Proof of the trespass at any time before the commencement of the action is sufficient.

An assault, being one entire individual act, cannot be committed at different times, and consequently ought not to be stated in the declaration to have been so committed.

In trespass and assault, it was alleged in the declaration^p, that the defendant on such a day, and on divers other days and times between that day and the day of exhibiting the bill, made an *assault* on the plaintiff; the declaration was holden bad on special demurrer. But where the declaration stated that the defendant *assaulted* the plaintiff on divers days and times^q, it was adjudged good on special demurrer (4).

The declaration ought to allege the fact to have been committed *vi et armis*, and *contra pacem*. Doubts seem to have been entertained, whether the omission of these words was matter of form or substance, at the common law. But now, by stat. 16 and 17 Car. 2. c. 8. s. 1. the omission is aided after verdict; and by stat. 4 Ann. c. 16. s. 1. it is enacted, that no exception shall be taken in any court of record of the omission of *vi et armis*, and *contra pacem*, except the same shall be specially shewn for cause of demurrer.

^m 23 Geo. 3. c. 70. s. 34.

ⁿ 24 Geo. 3. c. 47. s. 35.

^o Litt Sect. 485. 1 Inst. 293. a.

^p English v. Purser, B. R. 6 East. R.

^q 395. recognising *Michell v. Neale*, Cowp. 828.

^q *Burgess v. Freelove*, C. B. 2 Bos. & Pul. 425.

(4) From the report of this case of *Burgess v. Freelove*, it appears that the Court of Common Pleas did not consider *Michell v. Neale*, Cowp. 828, as a sound authority. But Lord Ellenborough C. J. in *English v. Purser*, took a distinction between the words "made an assault" in *Michell v. Neale*, and the word "assaulted" in *Burgess v. Freelove*, on the ground that the latter might mean that the defendant committed so many different assaults on the different days, admitting however that the distinction was very nice. This distinction certainly was not adverted to by the court in *Burgess v. Freelove*.

The declaration ought to allege the commission of the fact positively, and not by way of recital, e. g. for *that* on such a day the defendant made an assault on the plaintiff, and not for that *whereas*, &c. Formerly it was usual, in the Court of King's Bench, to arrest or reverse^r judgments for declaring in trespass by way of recital, or, as it was then called, the pleadings being in Latin, with a *quod cum*. But now the court will permit the plaintiff to amend the declaration by a bill filed right, the time of filing which bill the court will not enquire into^t.

In *Parker v. Tanswell*, B. R. M. 14 G. 3. 10 MS. 347, Serj. Hill's Coll. in Lincoln's Inn Library, an amendment of this kind was permitted after a judgment by default, the court saying that they hoped the objection on the *quod cum* would now be at rest.

In proceedings by original, where the writ is set out in the declaration, the count is helped as to this defect, and made good by the writ^t.

If the declaration contains only one count^u, the plaintiff, after proving one assault, cannot wave that, and proceed to give evidence of another.

III. Of the Pleadings.

THE general issue to an action of assault and battery is not guilty, which constitutes a proper issue, in case the defendant has not committed the injury complained of.

By stat. 7 Jac. 1. c. 5, " In any action upon the case, trespass, battery, or false imprisonment, against any J. P. mayor, bailiff, constable, &c. for any thing done by virtue of their offices, and against all others acting in their aid or assistance, or by their command concerning their offices, they may plead the general issue, and give the special matter in evidence."

The preceding statute was made perpetual by stat. 21 Jac. 1. c. 12. and extended to churchwardens, overseers of the poor, and others acting in their aid or by their command.

^r *Brigs v. Sheriff*, Cro. Eliz. 507.

^s *Wilder v. Handy*, Str. 1151. *Marshall v. Riggs*, Str. 1162.

^t *White v. Shaw*, 2 Wils. 203. adjudged on special demurrer.

^u *Stante v. Pricket*, 1 Camp. N. P. C. 473.

Justification in Defence of Person.—If the plaintiff was the aggressor, and the injury of which he complains was occasioned by his own assault on the defendant, so that the act of the defendant became necessary for the defence of his person, the action cannot be maintained^x, because the law will permit any degree of violence to be justified, if it be necessary for the safety of the person. This defence or justification, which is the most usual in this action, and which is technically termed *son assault demesne*, must be pleaded specially (5)^y.

In like manner a defendant may justify an assault and battery in the defence of his wife^z (6), child (7), or servant^a (8). So a wife may justify in defence of her husband^b, a child of a parent, and a servant in defence of the person of his master^c. It must be observed that where a servant justifies in defence of his master, it ought to be alleged in the plea that the plaintiff would have beat the master, if the servant had not interposed. In trespass^d, assault, and battery against A. and B., A. pleaded *son assault*, and B. pleaded that he was servant to A., and that the plaintiff having assaulted his master in his presence, he in defence of his master struck the plaintiff. On demurrer the plea was holden ill, for the assault on the master might be over, and the servant cannot strike by way of revenge, but in order to prevent an injury; and the right way of pleading is, that the plaintiff would have beat the master if the servant had not interposed, *proux ei bene licuit*. Judgment for the plaintiff.

Justification in Defence of Possession.—So a defendant may justify in defence of his possession^e: as if A. enter the close of B. unlawfully, B. having first requested (9) A. to

^x Cockroft v. Smith, Salk. 642.

^y 1 Inst. 282. b. 283. a.

^z 2 Rol. Abr. 546. (D) pl. 1. Bro. Trespass, pl. 198.

^a 2 Rol. Abr. 546. (D) pl. 2.

^b Leeward v. Basely, Ld. Raym. 62.

^c 2 Rol. Ab. 546. (D) pl. 3. Adm. per Cur. in Ld. Raym. 62, and Salk. 407.

^d Barfoot v. Reynolds and another, Str. 953.

^e 2 Rol. Abr. 548. (G) pl. 2.

(5) See the form, Co. Entr. 2d ed. 644. a.

(6) Winch. Ent. ed. 1680. p. 1121.

(7) Clerk's Assistant, p. 90, 91.

(8) In Leeward v. Basely, Salk. 407. and Ld. Raymond, 62. it was said by the court, that a master could not justify an assault in defence of his servant, because the master might have an action *per quod servitium amisit*; which opinion is adopted in Bull. N. P. 18.

(9) Every *impositio manuum* is an assault and battery, which cannot be justified upon account of breaking the close in law without a previous request. Green v. Goddard, Salk. 641.

depart, may, on his refusal, justify laying his hand on A. in order to remove him^f. It must be observed, that B. ought not to begin with striking, or offering violence to A^s., for the law, in the first instance, merely allows B. in defence of his possession, to lay his hand gently on A. Hence a charge of beating, wounding, and knocking the party down, cannot be justified by a plea of *molliter manus imposuit*^h. If indeed A. should forcibly resist the endeavour to remove him, it will then be lawful to oppose force to force, and any degree of violence which may be necessary in self-defence will be justifiable. If the entry of the close be forcible, as by breaking down a gate, or the like, a previous request is unnecessaryⁱ; for acts of violence, on the part of the trespasser, may be instantly opposed by such other acts of violence, on the part of the owner, as may be necessary for the immediate defence of his possession.

Trespass, assault, and battery, with a stick^k: the defendant pleaded as to the assault and battery, that he was possessed of a close, and that the plaintiff with force and arms, and with a strong hand as much as in him lay, did attempt and endeavour forcibly to break into and enter the said close of the defendant, whereupon the defendant resisted and opposed such entrance, and defended his possession as it was lawful for him to do, and that if any injury happened to the plaintiff, it was in defence of the possession of the close. Replication, *de injuriâ suâ propriâ absque tali causâ*, and issue found for the defendant. A motion was made to enter up judgment for the plaintiff, notwithstanding the justification in the said plea, which was found for the defendant, on the ground that the plea could not be supported, on the authority of *Jones v. Tresilian*, 1 Mod. 36. where Twisden, J. said, "you cannot justify the beating of a man in defence of your possession, but you may say that you did *molliter manus imponere*," &c. The case having been argued, Lord Kenyon, C. J. said, that the plaintiff could not succeed in his application, unless he could shew that the words *molliter manus imposuit* were mere technical words; that a party might resist and oppose force by force, in defence of his possession, if necessary: if the resistance were excessive, the plaintiff might shew that in a new assignment. Lawrence, J. said that the general form of pleading had been by *molliter manus imposuit*, and on this ground, that the defendant ought not, in the first instance, to begin with striking the plaintiff, but

^f See the form, 2 Lutw. 1435.

^g 2 Inst. 316.

^h *Gregory and wife v. Hill*, 8 T. R. 299.

ⁱ *Green v. Goddard*, Salk. 651.

^k *Weaver v. Bush*, 8 T. R. 78.

the law allows him either in defence of his person or possession to lay his hand on the plaintiff, and then he may say, if any further mischief ensued, it was in consequence of the plaintiff's own act; so that the battery follows from the resistance. But it does not necessarily follow from any thing stated in this plea, that the defendant did more than gently lay his hands on the plaintiff in the first instance; and if not, this plea may stand consistently with the authorities." Rule discharged.

In framing justifications in defence of possession, it is not necessary for the defendant to set forth the particulars of his title; it is sufficient to state that defendant was possessed, &c. for this is merely an inducement and conveyance to the substance of the plea.

Trespass of assault, battery, and wounding. The defendant pleaded to the wounding, not guilty¹, and to the assault and battery that he was possessed of an house in such a parish for years; that the plaintiff entered his house, and would have thrust him out of possession thereof, whereupon he *molliter manus imposuit*, to put him out, and the harm, if any done, was in defence of his own possession. On demurrer, it was contended that the defendant ought to have set forth particularly who made the lease, when it was made, and for how many years; but the court held the plea good, for the statement of the possession for years, was only an inducement and conveyance to the justification, the substance of which was, that he offered to thrust him out of the possession of his house, and that the title or interest not coming in question, it was not necessary that the allegation should be as certain as where a claim was made by the defendant.

The observations which have been made in respect of the defence of real property, apply also to the defence of personal property, for the protection of which the law will not permit violence to be offered in the first instance; and although it be not necessary in this case to request the person who has taken the property to restore it, yet unless such property is seized, or attempted to be seized, *forcibly*, the owner cannot justify any thing more than gently laying his hands on the trespasser in order to recover it.

Justifications by Officers executing Process.—In like manner a sheriff's officer cannot justify any act more than laying his hand on another for the purpose of executing legal

¹ Skevill v. Avery, Cro. Car. 133.

process, unless acts of violence become necessary by a resistance on the part of the person apprehended, or an endeavour to rescue himself^m.

A battery cannot be justified by shewing an arrest merelyⁿ, because an arrest may be made without touching the person, as if a bailiff comes into a room where the defendant is, and having locked the door, tells him that he is arrested, that is an arrest; for the defendant is in the custody of the officer.

It has been doubted, whether a defendant can justify a battery by stating that he gently laid his hands on the plaintiff in order to arrest him, and did arrest him. But this mode of pleading was adjudged to be good, in *Titley v. Foxall*, Willes, 688. And in *Tottage v. Petty*, Ca. Temp. Hardw. and MSS. where to trespass for assault and battery, the defendant as to the assault and battery pleaded, that the plaintiff entered his house without his leave, and there disturbed him, whereupon the defendant requested the plaintiff to quit his house, and because the plaintiff would not, the defendant *gently laid his hands* on the plaintiff to thrust him out: on demurrer the case of *Williams v. Jones* was cited as an authority to shew that this plea was bad; but Lord Hardwicke C. J. said, "It was not determined by us in *Williams v. Jones*, that a battery could not be justified by a *molliter manus imposuit*, but that it could not be justified by merely shewing an arrest." The court were clearly of opinion that the plea was good, and gave judgment for the defendant (10).

^m *Truscott v. Carpenter and Mau*, Lord Raym. 229. *Williams v. Jones*, Str. 1049. and Ca. Temp. Hard. 298. more fully reported. ⁿ *Williams v. Jones*, Ca. Temp. Hard. 293.

(10) See an excellent note on this subject, and on the manner of pleading justifications of this kind by Serj. Williams, in *Green v. Jones*, 1 Saund. 296. "An officer cannot justify more than the assault, by virtue of the arrest, without shewing that the plaintiff resisted or endeavoured to rescue himself, *unless it be by way of molliter manus imposuit, and in that manner he may justify the beating without shewing any resistance or attempt to rescue.*" Bull. N. P. 19. cites *Titley v. Foxhall*. In this case, however, as well as in the case of a plea of resistance, or an attempt to rescue, it is competent to the plaintiff to reply an unjustifiable or subsequent battery, as suggested by Kingsmil J. in a case in 21 H. 7. "Que puis cel matter de ses mains le defendant batit le plaintiff." See Mr. Durnford's note on this subject in his valuable edition of Willes's Reports, p. 17. n (b.)

Regularly, when the defendant justifies under a writ, warrant, precept, or any other authority, he must set it forth in his plea^o.

Other Justifications.—The law looks with an indulgent eye on such acts of discipline as are necessary for the preservation of social order. Hence a master may moderately correct his servant, a parent chastise his child, and a schoolmaster his scholar^p. In like manner an officer may justify the moderate and reasonable correction of those who are placed under his command, if they disobey his orders.

The defendant may justify even a *maihem*^q, if done by him as an officer in the army for disobeying orders; and he may give in evidence the sentence of the council at war upon a petition against him by the plaintiff; and if by the sentence the petition is dismissed, it will be conclusive evidence in favour of the defendant.

The several preceding instances of justifications must, as has been observed with respect to the justification of *son assault demesne*, be pleaded specially^r. In framing these pleas care must be taken that the battery be admitted and confessed; otherwise, on demurrer, the plaintiff will be entitled to judgment; for it is a rule of pleading that the party justifying must shew and admit the fact. The fact admitted must also amount in law to a battery *by the defendant*, otherwise it will not be tantamount to an admission, and the plea will be bad, as being in violation of the preceding rule; although the defendant might have succeeded, if he had pleaded the general issue. The following case will illustrate this position.

Trespass, assault, and battery. The defendant pleaded that he was riding on a horse in the king's highway^s, and that his horse being frightened, ran away with him, and that the plaintiff was desired to go out of the way, and did not, and the horse ran upon the plaintiff against the defendant's will. On demurrer the plaintiff had judgment, because the defendant had justified the battery, and yet had not confessed that which amounted to a battery by himself; for if the horse ran away against the will of the rider, it could not be said, with any colour of reason, to be a battery

^o 1 Inst. 283. a. *Matthews v. Cary*,
3 Mod. 137. 138. Carth. 73. S. C.

^p Rastal. Entr. 613. pl. 18. Ed. 2nd.

^q Lane and Degberg, H. 11. W. 3. per
Treby C. J. London Sittings. Salk.

MS. Gilb. Ev. 37. Ed. 1761. Bull.
N. P. 19. S. C.

^r 1 Inst. 282. b.

^s *Gibbons v. Pepper*, Salk. 637. and
Ld. Raym. 38.

in the rider (11); it was admitted, however, by the court, that if the defendant had pleaded not guilty, this matter might have acquitted him upon evidence.

Of local and transitory Justifications.—If the cause of the justification be local^a, as if a constable of a town in another county arrests the body of a man that breaks the peace, the constable may in his justification traverse the county in which the declaration is laid: but he must not only traverse that but all other places, saving in the town whereof he is constable^a. So if the declaration charge the defendant with an assault and battery in London, if the defendant justify in defence of his possession at Waltham in Essex, he ought to traverse every other place except Waltham^a. To traverse the parish and not the county will be bad on demurrer^y.

If the matter of the justification be transitory, it ought to follow the place laid in the declaration^a.

An action was brought for a battery at D^a., the defendant justified under the command of certain bailiffs executing legal process at S. in the same county. The plea was holden to be bad, for the bailiffs having authority throughout the whole county, the cause of justification was not local, so that the defendant ought to have justified in the same place in which the plaintiff had declared.

A battery in his own defence is not local^b, but may be justified in every place; consequently, such a justification, according to the preceding rule, must follow the place laid in the declaration.

If a justification be at the same time and place, it is needless to aver, that it is the same trespass^c.

Where the defendant pleads a local justification^d, the plaintiff may vary in his replication, either in time or place, from the time or place laid in the declaration, and it will not be a departure.

t 1 Inst. 282. a. b.

u Peacock v. Peacock, Cro. Eliz. 705.

x Bridgwater v. Bythway, 3 Lev. 113.

y Johnson v. Burton, Cro. Eliz. 860.

z 1 Inst. 282. a. b.

a Bridgwater v. Bythway, 3 Lev. 113.

b Purset v. Hutchings, Cro. Eliz. 842.

c King and ux. v. Phippard, Carth. 281.

d Serle v. Darford, Ld. Raym. 120. and

Lutw. 1435.

(11) If A. beats the horse of B. whereby he runs against C., A. is the trespasser, and not B. So if A. takes the hand of B. and with it strikes C., A. is the trespasser, and not B. Per Cur. Salk. 638. and Ld. Raym. 39.

To an action for an assault and battery, the defendant may plead, not guilty within four years next after the cause of action^e; but if he mistakes the limitation of time, and pleads, not guilty within six years, the plea will be bad on demurrer^f. From a recent case it appears that this demurrer must be special^g.

Of the Replication.—The usual replication to the preceding justifications where they consist merely of matter of fact, triable by the country, as *son assault demesne*, is, that the defendant committed the trespasses of his own wrong, and without the cause alleged by him in his plea. This is termed a replication *de injuriâ suâ propriâ absque tali causâ*.

If the defendant pleads *son assault demesne*^h, and the plaintiff can justify it, such justification ought to be pleaded specially; for it cannot be given in evidence under the general replication of *de injuriâ suâ propriâ*.

On the general replication of *de injuriâ suâ propriâ* to *son assault demesne*ⁱ, the plaintiff cannot give in evidence a battery at a day and place different from that laid in the declaration.

Hence if there were two assaults, one of which the defendant can justify, and the other not^k, the plaintiff must new assign the assault for which he brought his action (12), otherwise the defendant will be entitled to a verdict on his justification.

Where the plaintiff declares of a single act of assault and battery^l, to which the defendant pleads *son assault demesne*, the plaintiff cannot reply *de injuriâ suâ propriâ*, and also

^e 21 Jac. 1. c. 16. s. 3.

^f Blackmore v. Tidderly, Salk. 423. and Lord Raym. 1099.

^g Macfadzen v. Olivant, 6 East's R. 388.

^h King and ux. v. Phippard, Carth. 281.

ⁱ Downes v. Skrymsher, 1 Brownl. R. 233.

^k 3 Roll. Abr. 680. (C) pl. 3. Walsby v. Oakley, London Sittings after M. T. 40 Geo. 3. MSS. S. P. per Kenyon C. J.

^l Franks v. Morris, 10 East, 81. n.

(12) "If there were two batteries on one day, and the one were on the plaintiff's own assault, and the other not, if the defendant will justify one *de son assault demesne*, the plaintiff may make a new assignment of the other battery," per Cur. in Elwis v. Lombe, 6 Mod. 120. A new assignment, however, in these cases, is only necessary where there is but one count in the declaration; for if the declaration contain as many counts as there were assaults, &c. and some of them cannot be justified, the plaintiff may prove those without a new assignment. Bull. N. P. 17.

new assign that the defendant beat the plaintiff in a more violent manner than was necessary for the defence of himself; because such replication *and* new assignment constitute in effect a double replication, which is not allowed by the rules of pleading.

IV. *Of the Verdict and Judgment.*

DAMAGES may be given in this action not merely for the corporal injury, which in many cases may be very small, but also for the degrading insult with which it is accompanied.

Against joint trespassers there can be but one satisfaction^m, and, therefore, if they are sued in one action, although they sever in pleas and issues, yet one jury shall assess damages for all; and if all the issues are found for the plaintiff, the jurors ought not to sever the damages, for, if they do, the verdict will be vicious (13). And if in such case judgment be entered for the separate damages, such judgment will be erroneousⁿ. But, before judgment, the defect of the verdict may be cured, by the entry of a *nolle prosequi* against all the defendants, except one, and taking judgment against that one only^o.

So if joint defendants suffer judgment by default, and the plaintiff execute separate writs of inquiry against them, whereupon several damages are given, it is irregular; and if final judgment be entered for those damages, such judgment will be erroneous^p. But, before final judgment, the

^m Hob. 66. Heydon's case, 5th Resol.

11 Rep 7.

ⁿ Crane v. Hammerstone, Cro. Jac.

118. Hill v. Goodchild, 5 Burr. 2791.

^o Rodney v. Strobe, Carth. 19.

^p Mitchell v. Milbank, 6 T. R. 199.

(13) On the trial of an action against two defendants A. and B. it was proved that the assault by A. was more violent than that by B. Lord Ellenborough C. J. told the jury that the damages could not be severed, so as to give more damages against A. than against B. but that they might give their verdict against both, to the amount which they thought the most culpable ought to pay. *Brown v. Allen and Oliver*, 4 Esp. N. P. C. 158.

court will permit the plaintiff, in order to cure the error, to set aside his own proceedings, upon payment of costs, and to issue a new writ of inquiry.

V. Of the Costs.

By Stat. 22 and 23 Car. 2. c. 9. (14) " In all actions of assault and battery, wherein the judge *at the trial of the cause* shall not certify under his hand upon the back of the record, that an assault *and* battery was sufficiently proved by the plaintiff against the defendant, the plaintiff, in case the jury shall find the damages to be under the value of forty shillings, shall not recover more costs than the damages so found shall amount unto."

Upon this statute, which does not extend to writs of inquiry^q, it must be observed, that a certificate of an assault only is not sufficient to entitle the plaintiff to full costs^r, and, consequently, although an admission on the record of a battery, by a justification of it, will supersede the necessity of a certificate^s, yet a similar admission of an assault only will not^t.

An injury to a personal chattel, although laid in the same declaration with an assault and battery, is not within the statute^u; but this rule holds only where such injury is a substantive and independent injury, and stated in a distinct and independent count; for where in trespass for an assault and battery^x and tearing plaintiff's clothes, the jury found that the tearing was in consequence of the battery, and gave less than forty shillings damages, it was holden that the plaintiff was not entitled to any more costs than damages. So where in an action of assault, and for tearing the plaintiff's clothes, the plaintiff recovered less than forty shillings^y, although

q *Sheldon v. Ludgate*, C.B.T. 3 Geo. 1. Bull. N. P. 329.

r *Smith v. Neesam*, 2 Lev. 102.

s *Smith v. Edge*, 6 T. R. 562.

t *Page v. Creed*, 3 T. R. 391. *Brennan v. Redmond*, 1 Taunton's R. 16.

u *Milbourne v. Reade*, 3 Wils. 322.

x *Cotterill v. Tolly*, 1 T. R. 655.

Hamson v. Ashdead, B. R. T. 27

Geo. 2. Bull. N. P. 329. and *Sayer's Rep.* 91.

y *Mears v. Greenaway*, 1 H. Bl. 291.

(14) Extended to courts of Great Sessions for Wales and Chester, Court of Common Pleas for county palatine of Lancaster, and Court of Pleas for county palatine of Durham, by stat. 11 and 12 W. 3. c. 9.

the declaration charged the tearing the clothes as a substantive fact, yet the tearing being stated in the same count with the assault and battery², and alleged to have been done at the same time and place, it was holden that the plaintiff was not entitled to any more costs than damages; for the court will construe the declaration so as to accomplish the object of the statute, and after a general verdict, it will be intended that the tearing was found to be part of the same act, and a consequence of the battery.

By stat. 8 and 9 W. 3. c. 11. s. 1. "Where several persons
 "are made defendants to any action or plaint of trespass, (15)
 "assault or false imprisonment, and any one or more of
 "them shall be upon the trial thereof acquitted by verdict,
 "every person so acquitted shall have his costs in like man-
 "ner as if a verdict had been given against the plaintiff and
 "acquitted all the defendants, unless the judge, before
 "whom such cause shall be tried, shall, *immediately after*
 "*the trial thereof in open court*, certify upon the record un-
 "der his hand, that there was a reasonable cause for making
 "such person a defendant to such action."

In assault and battery against several defendants, one let judgment go by default, and the others pleaded not guilty^a. On the trial, the jury gave damages against him who had suffered judgment by default, and found the other defendants not guilty. Wilmot J. being desired to certify that there was a reasonable cause to make the others defendants, said he thought the stat. 8 and 9 W. 3. c. 11. s. 1. did not extend to this case, but only to cases where some of the defendants are convicted by verdict, and others acquitted. In this case it is as if they had severed in pleading, and as if the action was against the others only; and on these grounds he refused to certify.

By stat. 8 and 9 W. 3. c. 11. s. 4. "In all actions of tres-
 "pass, commenced or prosecuted in any of his Majesty's
 "courts of record at Westminster, wherein at the trial of
 "the cause it shall appear, and be certified by the judge un-
 "der his hand, upon the back of the record, that the tres-
 "pass upon which any defendant shall be found guilty was

^z Lockwood v. Stannard, 5 T. R. 482. ^a Collins v. Harrison and others, Worcester Lent Ass. 1757, MSS.
 S. P.

(15) i. e. trespass *vi et armis*; for it has been holden, that this statute does not extend to actions of trespass on the case, as for a nuisance. Tipping v. Coot and Nutt, H. 8 G. 2. B. R. MSS. S. C. cited in Buller's N. P. 331, by the name of Dibbon v. Cook.

“ wilful and malicious, the plaintiff shall recover not only
“ his damages but full costs.”

Of the Certificate under the 43 Eliz. to deprive the Plaintiff of Costs.—The preceding statutes enable plaintiffs, by means of the judge’s certificate, to recover full costs; it remains only to mention the 43d Eliz. c. 6. s. 2. which empowers judges in all personal actions, not therein excepted, to deprive plaintiffs, by means of a certificate, which may be granted under certain circumstances, of the benefit of full costs.

The provisions of this statute are as follow^b: “ If upon
“ any action personal, brought in any of the king’s courts
“ at Westminster, not being for any title or interest of lands,
“ (16) nor concerning the freehold or inheritance of any
“ lands, nor for any battery, it shall appear to the judges
“ for the same court, and so signified or set down by the
“ justices before whom the same shall be tried, that the
“ debt or damages to be recovered therein shall not amount
“ to the sum of forty shillings or above, the judges before
“ whom any such action shall be pursued shall not award
“ for costs to the plaintiff any greater costs than the amount
“ of the debt or damages recovered, but less at their dis-
“ cretion.”

In trespass for an assault and taking a rope, the jury gave eighteen-pence damages^c. And Mr. Justice Burnet, who tried the cause, certified according to st. 43 Eliz. c. 6. in order to deprive plaintiff of costs. The plaintiff however moved (as it was a new case) for costs *de incremento*, pretending that here was an *asportavit*, which, on the 22 & 23 Car. 2. c. 9. had been always holden to carry costs. But the court in this case refused to give costs, for the st. 43 Eliz. takes in all but a few excepted cases, of which this is not one. “ And

^b 43 Eliz. c. 6. s. 2.

^c Walker v. Robinson, Str. 1232, and 1 Wils. 93.

(16) An action on the case, for a disturbance of or injury to the plaintiff’s right of common, is not *necessarily* an action for any title or interest of lands; it may be brought in order to assert such title, or a right to such interest; or it may be brought against a mere wrong-doer, when the plaintiff’s title to common is not disputed; or against another commoner, where there is no question on the right of either party: in the two last cases it is within the statute and the judge may certify. *Edmonson v. Edmonson*, 8 East, 294.

“ though it has not been usual to grant a certificate on this act, yet we have often known it threatened (17).”

It has been holden^d, that a certificate upon this statute may be granted after the trial of the cause, the time for granting it not having been fixed by the statute.

d *Holland v. Gore*, C. B. T. 22 Geo. 2. *Sayer on Costs*, 19.

(17) In *White v. Smith*, C. B. E. 17 Geo. 2. Willes C. J. in an action for taking sand on Hounslow Heath, certified under this statute. A similar certificate was granted in *Bartlet v. Robbins*, C. B. E. 5 Geo. 3. in an action of assumpsit, and recently by Kenyon C. J. in *Dand v. Sexton*, H. 29 Geo. 3. 3 T. R. 37. in an action of trespass *vi et armis* for beating a dog, although it was urged that the statute applied to those actions only which could be brought in the county court, and that consequently it did not extend to an action *vi et armis*. The Court of King's Bench concurred in opinion with Kenyon C. J. as to the propriety of granting this certificate, on the authority of the preceding cases. In *Emmet v. Lyne*, E. 45 G. 3. C. B. 1 N. R. 255. Sir J. Mansfield C. J. certified under this statute, in an action for false imprisonment; the court were of opinion, that the certificate was rightly granted, because an imprisonment did not necessarily include a battery. In *Edmonson v. Edmonson*, Carlisle Summ. Ass. 1806, Sutton, baron, certified in an action on the case for an injury done to the plaintiff's right of common by digging turves there; and the Court of King's Bench held, that the certificate was proper. See 8 East, 294, and ante, n. 14.

CHAP. IV.

OF THE ACTION OF ASSUMPSIT.

- I. *Of the Action of Assumpsit, and of the Agreement, for the Non-performance of which this Action may be maintained.*
 - II. *Of the general Indebitatus Assumpsit.*
 - III. *Of the Declaration.*
 - IV. *Of the Pleadings,*
 1. *Of the General Issue, and what may be given in Evidence under it.*
 2. *Accord and Satisfaction.*
 3. *Infancy.*
 4. *Payment.*
 5. *Release.*
 6. *Statutes,*
 1. *Of Limitation.*
 2. *Of Set-off.*
 7. *Tender.*
-

- I. *Of the Action of Assumpsit, and of the Agreement, for the Non-performance of which this Action may be maintained.*

DEFINITION.—The action of assumpsit is an action of trespass on the case, whereby a compensation, in damages, may be recovered for an injury sustained by the non-performance of a parol agreement.

Agreements are distinguished, into agreements by spe-

cialty, and agreements by parol. The law of England does not recognize any other distinction. If agreements are merely written, and not specialties, they are parol agreements^a.

The action of assumpsit is confined to agreements by parol, the action of covenant^b or debt being the proper remedy for the non-performance of agreements by specialty.

The essential parts of every parol agreement are, the promise or undertaking of one party, and the consideration on which such promise or undertaking is founded, proceeding from the other party. Sometimes the promise is expressed by the party, and sometimes it is raised by implication of law. In the former case, it is termed an express, in the latter, an implied promise. In parol agreements, the law will not imply a consideration; consequently in actions of assumpsit, a consideration must be stated and proved (1).

Of the Consideration.—Every promise, for the non-performance of which an action of assumpsit may be maintained, must be founded on a sufficient consideration (2), that is, a consideration either of benefit to the defendant^c, or of benefit to a stranger^d, or of damage, or of loss^e sustained by

^a Per Skynner C. B. delivering the opinion of the judges in *Rann v. Hughes*, D.P. 14 May, 1778, 7 T. R. 351. n.

^b *Bennet v. Guyldley*, Cro. Jac. 505.

^c Per Buller J. in *Nerot v. Wallace*, 3

T. R. 24. and *Cooke v. Oxley*, 3 T. R. 653.

^d Per Gawdy and Fenner Js. in *Greenleaf v. Barker*, Cro. Eliz. 194.

^e Per Elleuborough C. J. in *Bunn v. Guy*, 4 East's R. 194.

(1) Bills of exchange and promissory notes form an exception to this rule.

(2) It is worthy of observation, that Sir William Blackstone, in that part of the third volume of his Commentaries wherein he treats of the action of assumpsit, has not either named, described, or even alluded to the consideration requisite to support an assumpsit: and what is more remarkable, the example put by him in order to illustrate the nature of the action is, in the terms in which it is there stated, a case of *nudum pactum*: "If a builder promises, undertakes, or assumes to Caius, that he will build and cover his house within a time limited, *and fails to do it*, Caius has an action on the case against the builder for this breach of his express promise, undertaking, or assumpsit." See 1 Roll. Abr. 9. 1. 41. Doct. and Stud. Dial. 2. ch. 24. and *Elsee v. Gatward*, 5. T.R. 143. that an action will not lie for a mere nonfeasance, unless the promise is founded on a consideration. This remark ought not, neither was it intended, to derogate from the merit of a justly celebrated writer, who for comprehensive design, luminous arrangement, and

the plaintiff, *at the request* of the defendant: and herein the law of England adopts and recognizes the rule of the civil law, *ex nudo pacto non oritur actio*^f.

Any act of the plaintiff, from which the defendant derives a benefit or advantage, or any labour, detriment^g, or inconvenience sustained by the plaintiff, however small^h the benefit or inconvenience may be, is a sufficient consideration, if such act is performed, or such inconvenience suffered by the plaintiff, with the consentⁱ, either express or implied, of the defendant, or in the language of pleading, "at the special instance and request of the defendant." It is, however, clearly established, that the consideration must be of *some* value, in contemplation of law (3); for where A. in consideration that B. would make an estate at will to him, as his counsel should devise, promised, &c. it was holden a void promise, for want of a sufficient consideration, because B. might immediately determine his will^k.

So where the testator had committed to the care of the defendant his children^l, and the disposition of his goods, during their minority, *for their education*, and thereupon the defendant promised the testator to procure the assurance of certain lands to one of the testator's children, the consideration was holden insufficient; for the law would not in-

f 17 E. 4. 4 b. Plowd. 305 a. 308 b. i Stokes v. Lewis, 1 T. R. 21 Child v.
g Williamson v. Clements, 1 Taunt. Morley, 8 T. R. 610.
528. k 1 Roll. Abr. 23. pl. 29.
h Sturlyn v. Albany, Cro. Eliz. 67. l Smith v. Smith, 3 Leon. 88.
March v. Culpepper, Cro. Car. 70.

elegance of diction, is unrivalled. It is possible, that the learned commentator might have selected his example from Bro. Abr. tit. Action sur le Case, 72. without adverting to the omission of the consideration.

(3) The case of Wheatly v. Law, Cro. Jac. 667. (recognized by Holt C. J. in Coggs v. Bernard, Lord Raym. 920.) in which it was adjudged, that the acceptance of a sum of money by the defendant from the plaintiff, for the purpose of paying it over to a creditor of the plaintiff, was a sufficient consideration to support a promise by the defendant to perform the trust, may appear an exception to this rule. The exception, however, is only apparent; for, from the report of the same case in Palm. 281, under the name of Loe's case, it is evident, that the Chief Justice considered the detention of the money as a damage to the plaintiff. Whether the application of the rule was just in that case, is another question. It is clear, however, that the rule itself was recognized by the court.

tend that the defendant had made any private gain to himself, but that he had disposed of the goods for the benefit of the children, according to the trust reposed in him.

The mere performance of an act, which the party was by law bound to perform, is not a sufficient consideration. Hence a promise made by the master, when a ship was in distress, to pay an extra sum to a mariner as an inducement to extraordinary exertion on his part, has been holden to be void; because a seaman is bound to exert himself to the utmost in the service of the ship^m.

So where, in the course of a voyage, some of the seamen deserted, and the captain, not being able to find others to supply their place, promised to divide the wages, which would have become due to them, among the remainder of the crew, it was holdenⁿ, that this promise was void for want of a consideration; for the desertion of a part of the crew was to be considered as an emergency of the voyage as much as their death, and the remainder of the crew were bound, by the terms of their original contract, to exert themselves to the utmost to bring the ship in safety to her destined port.

Natural affection, although sufficient to raise an use, is not a sufficient consideration, whereon an assumpsit may be founded^o (4).

Where A. is indebted to B. in one sum, and B. is indebted to C. in a less sum, if B. promise A. to discharge him of so much of his debt, as amounts to B.'s debt to C., this will be a good consideration for a promise by A. to pay C. the debt due to him from B^p.

^m Harris v. Watson, Peake, N. P. C. 79. Lord Kenyon, C. J. ^o Agreed by the Court in Bret. v. J. S. and wife, Cro. Eliz. 755.

ⁿ Stilk v. Myrick, 2 Camp. N. P. C. 317. ^p Gouldsbrough, 49.

(4) A release of an equity of redemption is a good consideration, and the common law will take notice, that the mortgagor has an equity to be relieved in Chancery. Thorpe v. Thorpe, Lord Raym. 663. But see Preston v. Christmas, 2 Wils. 87, where it was holden that the release of an equity of redemption was not of any value in contemplation of law.

How far a moral obligation is a sufficient consideration, and what must be understood by that term, see an elaborate note by the learned reporters of the cases adjudged in the Court of Common Pleas, in Wennall v. Adney, 3 Bos. & Pul. 249. and post p. n. (11.)

The defendant being indebted to the testator in a sum of money upon simple contract^q, the plaintiff, his executor, agreed to take a less sum, payable by instalments, in lieu of the original debt; in consideration whereof, the defendant promised the executor to pay him the lesser sum. On assumpsit brought, an exception was taken, in arrest of judgment, that the consideration was insufficient, because it did not appear that the plaintiff had discharged the defendant of the original debt. But the objection was over-ruled, because the original debt being due to the plaintiff, as executor, the action to recover that must have been in the detinet; but by the agreement on the part of the plaintiff to take a less sum, and the promise by the defendant to pay that sum, it became the proper debt of the plaintiff, and the action for it maintainable in his own name, without being named executor. And (by Yelverton Justice) although the less sum is not any satisfaction of the greater, because they are both of one nature, yet in respect that the nature of the action was changed, it was therefore a good consideration.

Forbearance of Suit—in what Cases a sufficient Consideration.—If a creditor, at the request of his debtor, forbear to sue him for a certain time, that is a sufficient consideration for a new promise by the debtor, for the non-performance of which an action of assumpsit may be maintained. So if a creditor at the request of J. S. forbear to sue his debtor for a certain time^r, that is a sufficient consideration to support a promise by J. S. to pay the debt. But by Stat. of Frauds, 29 Car. 2. c. 3. s. 4. this agreement must be in writing^s.

Forbearance to sue an executor (having assets) for a certain time upon a simple contract debt of his testator, is a good consideration to found a promise by the executor to pay the debt^t. So forbearance to sue an executor for a *reasonable* time for the debt of his testator, although the executor have not assets^u; but the agreement by the executor to pay the debt must be in writing^x, otherwise it will be void by Stat. of Frauds, 29 Car. 2. c. 3. s. 4.

That a forbearance to sue may be a good consideration, such forbearance must either be absolute^y, or for a definite

^q Goring v. Goring, Yelv. 10, 11.

^r 1 Roll. Abr. 27. pl. 49.

^s King v. Wilson, per Raym. C. J. Str. 973.

^t Fish v. Richardson, Cro. Jac. 47.

and Yelv. 55. Confirmed in Bond v. Payne, Cro. Jac. 273.

^u Johnson v. Whitchcott, 1 Roll. Abr. 24. pl. 33.

^x Grindall v. Davies, 1 Freem. 532.

^y Mapes v. Sidney, Cro. Jac. 683.

portion of time^z, or a reasonable time^a; forbearance for a little^b, or some time^c, is not sufficient.

It must be observed, that in cases where an action is brought against a defendant, on a promise made, in consideration of forbearance of suit, an objection will not be allowed, after verdict, that the declaration does not state how the original debt accrued; for this is only inducement to the action^d. So if the declaration omit to state to whom the plaintiff forbore and gave day of payment, the omission will be cured by verdict^e.

But, upon special demurrer, it has been holden not sufficient to state a consideration to forbear generally, unless it be also shewn, that there was some person to be forborne.

Plaintiff declared, that B., since deceased, was at his death indebted to the plaintiff in a sum of money, for goods sold and delivered^f, whereof defendant Nancy had notice, and thereupon, after the death of B. defendant Nancy, before her marriage with other defendant A., in consideration of the premises, and also in consideration that plaintiff would forbear and give day of payment of said sum of money, as aftermentioned, defendant N. by note in writing, signed by her according to the statute, &c. on 20 March, 1801, promised plaintiff to discharge said debt in a reasonable time. That plaintiff had forborne from the time of the promise hitherto, yet defendant refused to pay: special demurrer, assigning for causes, that it was not alleged, from whom said sum of money was due at time of promise, or that any person was then liable to pay the plaintiff that sum, or to whom plaintiff had forborne, and given day of payment of said sum, and, in general, that declaration did not disclose any legal and sufficient consideration for the supposed promise, or any good cause of action. The court were of opinion, that the declaration was bad, observing, that "it is a known rule of law, that to sustain a promise, or to render it obligatory, there must be either a benefit to the party making the promise, or some loss or disadvantage to the party to whom such promise is made; otherwise it is considered as *nudum pactum*, and cannot be enforced. It is improperly termed a *forbearance to sue*, when it is not shewn that there was any

z Fish v. Richardson, Cro. Jac. 47.

a Johnson v. Whitcote, 1 Roll. Abr. 34. pl. 33.

b 1 Roll. Abr. 23. pl. 25.

c Id. pl. 26.

d Austen v. Bewley, Cro. Jac. 543. Therne v. Fuller, Cro. Jac. 396.

e Marshall v. Birkenshaw, 1 Bos. & Pull. N. R. 172.

f Jones v. Ashburnham and Nancy, ux. 4 East. 455.

person liable to be sued, from whom satisfaction might have been obtained, and in respect to whom plaintiff may have been said to have forbore suit, at the time when the promise was made. There might not have been any administrator, or if administration granted, any assets of the deceased; or the deceased might have been a bastard, and have had no legal representatives entitled to take out administration of his effects."

The consideration of forbearance is not confined to forbearance from suing by *action*; for forbearance to sue, though the party is liable in equity only^g, or desisting from a suit in chancery^h, has been holden to be a good consideration. So desisting from further complaint before a justice of the peaceⁱ; so forbearing to proceed upon a *capias utlagatum*^k; so staying the trial of a cause, after issue joined^l, is a good consideration for a promise to pay the costs incurred.

In what Cases Forbearance of Suit is not a Consideration.—Forbearance of suit against a defendant, where originally there was not any cause of action, is not a consideration to support an assumpsit:

A. and B. were bound jointly and severally in a bond^m to C. who released to A. Afterwards B., in consideration that C. would forbear to sue him for the payment of the money due on the bond, promised to pay it. On assumpsit brought, and a special verdict, the court were clearly of opinion, that, the debt having been entirely discharged by the releaseⁿ made by the obligee to A., there was not any consideration whereon an assumpsit might be grounded.

So where in assumpsit^o, it was stated, that there were controversies between the plaintiff and defendant, concerning the profits of certain lands, which the father of the defendant had taken in his life-time, and that the plaintiff had purchased a writ out of chancery to the intent to exhibit a bill against the defendant for the said profits, the defendant, in consideration that the plaintiff would surcease his suit, promised the plaintiff that if he could prove, that the father of the defendant had taken the profits, or had the possession of the lands, under the title of the father of the plaintiff, he, defendant, would pay the plaintiff for the said profits. Af-

^g Scott v. Stephenson, 1 Lev. 71.

^h Dowdenay v. Oland, Cro. Eliz. 768.

See also Coulston v. Carr, Cro. Eliz. 847.

ⁱ Rippon v. Norton, Cro. Eliz. 881.

^k Jennings v. Harley, Cro. Eliz. 909, and Yelv. 19.

^l Dell v. Fereby, Cro. Eliz. 868.

^m Hammon v. Roll, March, 202.

ⁿ 1 Inst. 232. a.

^o Tooley v. Windham, Cro. Eliz. 206.

ter verdict for the plaintiff upon non-assumpsit, the court were of opinion, that there was not any good consideration; for it was not alleged that the defendant was heir or executor, and even if it had been so alleged, yet there was not any cause to charge him for a personal tort. Judgment for defendant.

So, where the declaration stated, that the father of the defendant became bound to the plaintiff by bond^p, with a penalty, conditioned for the payment of money at a day past, and which was not paid, and afterwards the father died; and the plaintiff intending to sue the defendant as son and heir on the bond, the defendant, in consideration that the plaintiff would forbear his intended suit against the defendant, promised to pay the debt. After non-assumpsit pleaded, and verdict for the plaintiff, a motion was made in arrest of judgment, on the ground, that there was not any consideration; for it did not appear, that the defendant's ancestor had bound himself *and his heirs*, and if the heir was not bound expressly by name, he was not bound at all. Judgment arrested (5).

So, where testator was indebted to the plaintiff for money lent^q, and for velvet and other merchandises sold and delivered, and promised to pay the plaintiff on a certain day, and died before the day; the plaintiff intending to sue the defendant, his executor, he, in consideration of forbearance for a certain time, promised to pay the debt. The defendant pleaded, that, at the time of the delivery of the goods, the testator was an infant. On demurrer, it was adjudged, that an action would not lie; for the contract of the infant was merely void, and if debt had been brought against him he might have pleaded *nil debet*.

So, where a *feme covert*^r, carrying on business as a feme sole trader in the city of London, purchased of the plaintiff articles in the way of her trade, and, after her death, her husband promised to pay for them; it was holden to be a

^p Barber v. Fox, 2 Saund. 136.

^r Fabian v. Plant, 1 Show. 183.

^q Stone v. Wythipoll, executor, Cro. Elix. 126.

(5) See also Hunt v. Swain, 1 Lev. 165. to the same effect. See also Crosseing v. Honor, 1 Vern. 180. where a bill was brought by the obligee in a bond against the heir of the obligor, alleging that he having assets by descent ought to satisfy the bond; the defendant demurred, because the plaintiff had not expressly alleged, *that the heir was bound in the bond*; and the demurrer was allowed.

void promise, for want of a consideration, the husband not being liable (6).

The mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage a farm in a husband-like manner^s.

Consideration must move from Plaintiff.—Having endeavoured to explain the nature of the consideration, as far as respects the sufficiency of it, it will be proper in the next place to observe, that the consideration on which the promise of the defendant is founded, must move from the plaintiff.

Therefore where the plaintiff declared^t, that A. being indebted to the plaintiff and defendant in two several sums of money, and B. being indebted to A. in another sum, and there being a communication between the parties, the defendant, in consideration that A. would permit the defendant to sue B. in A.'s name, for the recovery of the sum due from B. to A., promised, that he, the defendant, would pay A.'s debt to the plaintiff, and alleged that A. permitted the defendant to sue accordingly, and that he recovered; after verdict for the plaintiff, upon non-assumpsit, it was moved in arrest of judgment, that the plaintiff could not maintain this action; and of this opinion were the court, observing, that the plaintiff was a mere stranger to the consideration, having done nothing of trouble to himself, or of benefit to the defendant.

So where the plaintiff declared^u, that J. S. was indebted to the plaintiff, and it was agreed between J. S. and the defendant, that the defendant should pay to the plaintiff the debt due to him from J. S., and that J. S. should make the defendant a title to a house, in consideration whereof the

^s Powley v. Walker, 5 T. R. 373.

^u Crow v. Rogers, Str. 592.

^t Bourne v. Mason, 1 Ventr. 6.

(6) In Loyd v. Lee, 1 Str. 94. a married woman gave a promissory note as a *feme sole*, and after her husband's death, in consideration of forbearance, promised to pay it. It was insisted, that though the note was voidable by reason of the coverture, yet by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration. But Pratt C. J. held, that the note was absolutely void; and forbearance, where originally there was not any cause of action, was not a consideration to support an assumpsit. He added, that it might be otherwise where the contract was only voidable.

defendant promised to pay the plaintiff the debt due to him from J. S., and then averred that J. S. was always ready to perform his part of the agreement: on demurrer, judgment was given for the defendant, because the plaintiff was a stranger to the consideration.

The plaintiff declared, that his wife's father being seized of lands now descended to the defendant^z, and being about to cut down 1000l. worth of timber to raise a portion for his daughter, the defendant, being his heir, promised the father, in consideration that he would forbear to fell the timber, the defendant would pay the daughter 1000l.: after verdict for the plaintiff, upon non-assumpsit, it was moved in arrest of judgment, that the action ought not to have been brought by the daughter, but by the father; or if the father were dead, by his executors; for the promise was made to the father, and the daughter was neither privy nor interested in the consideration, nothing being due to her; but Scroggs C. J. said, that there was such apparent consideration of affection from the father to his children, for whom nature obliged him to provide, that the consideration and promise to the father might well extend to the children. Judgment for the plaintiff; for the son had the benefit by having the wood, and the daughter had lost her portion by these means.

Another Requisite of the Consideration.—It must be observed, in the next place, that the consideration must be such, as the party undertaking has a power by law to perform, or cause to be performed.

The plaintiff declared, that he being bailiff to J. S.^y, the defendant, in consideration that the plaintiff would discharge defendant of a debt due to J. S. promised, &c. After verdict and judgment for the plaintiff in the court below, it was reversed in B. R., because *the plaintiff could not discharge a debt due to his master.*

The principle established by the preceding case was recognized by Lord Kenyon C. J. in the case of *Nerot v. Wallace*, 3 T. R. 22. where the consideration was, that the plaintiffs, who were assignees under a commission of bankrupt against J. S., would forbear to proceed to have the examination of J. S. taken before the commissioners, concerning certain sums with which J. S. was charged, and that the commissioners would forbear and desist accordingly. Lord

^z *Dutton and Wife v. Pool*, B. R. M. 29 Car. 2. 2 Lev. 210. 1 Vent. 318. 334. affirmed on error in the Exchequer Ch. Trin. 31 Car. 2. T. Raym.

302. cited in *Martyn v. Hind*, E. T. 1776, Cowp. 439. 443.

^y *Harvey v. Gibbons*, 2 Lev. 161.

Kenyon said, "the ground on which I found my judgment is this, that every person, who in consideration of some advantage, either to himself or another, promises a benefit, must have the power of conferring that benefit up to the extent to which he professes that benefit should go, and that not only in fact, but in law. Now as to the promise made by the assignees in this case, which was the consideration of the defendant's promise, it was not in their power to perform it, because the commissioners had nevertheless a right to examine the bankrupt. And no collusion of the assignees could deprive the creditors of the right of examination, which the commissioners would procure them. The assignees stipulated, not only for their own acts, but also, that the commissioners should forbear to examine the bankrupt, but clearly they had no right to tie up the hands of the commissioners by any such agreement (7). And if any proposal of that sort had been made to the commissioners, they, as acting in a public duty, would have been guilty of a breach of that duty in acceding to it."

Consideration past or executed.—It remains only to add, that a consideration, past or executed, will not support a subsequent promise, unless the act was done at the request, either express or implied, of the party promising^a (8).

As if the servant of A. be arrested for a trespass^a, and J. S., without the request of A., bails the servant, and afterwards A. promises J. S. to indemnify him, the promise is void; because the bailing, which was the consideration, was past and executed before.

But where the act, which forms the consideration, is done at the request of the party promising, the circumstance of

^a 1 Roll. Abr. 11. pl. 1.

^a Dyer, 272.

(7) It must not be inferred from the language of Lord Kenyon in this case, that a party may not stipulate for the act, or forbearance of a stranger, and that such stipulation will not in any case form a good and sufficient consideration; if the act be such, as the stranger might do or abstain from doing legally, or without any breach of duty, an objection cannot be raised against such a consideration.

(8) See a note on this subject by Serjeant Williams in *Osborne v. Rogers*, 1 Saund. 264. n. (1.) See also *Hob. 106. Lampleigh v. Brathwait*, where it was agreed, that a mere voluntary courtesie will not have a consideration to uphold an assumpsit. But if that courtesie were moved by a suit or request of the party promising it will bind.

the promise being subsequent in point of time to the consideration will not affect it. As if A. requests B. to endeavour to procure a pardon for A.^b, and after B. has made such endeavour, A. in consideration thereof promises to pay him a certain sum of money, this is a good consideration.

The distinction established by these cases shews the necessity of stating in declarations on executed considerations, that they were done at the request of the party promising; for although, after verdict, the court will in some cases imply a request, yet after a judgment by default, the omission has been holden fatal; as, where the declaration was for work and labour done by the plaintiff for the defendant^c, and averred, that the plaintiff therefore deserved of the defendant so much, in consideration whereof he *afterwards* promised to pay. *After judgment by default*, and final judgment in C. B. for the plaintiff, it was objected on error in B. R., that this was a past consideration, and not being laid to be done *at the request* of the defendant, it could not be a consideration to raise an assumpsit. The court were of this opinion, and reversed the judgment in C. B., observing, that it did not appear, that the work was for the benefit of the defendant, and they must take it to be a past consideration, being laid that *afterwards* he promised to pay. They added, that, if this had been after verdict, an inference in support of the judgment might have been drawn from the words *for the defendant, and of the defendant* (9), but the statutes of jeofails did not protect judgments by default against objections that were cured by a verdict at common law, but such as were remedied after a verdict by the statutes (10).

It belongs to this branch of the subject to state, that if a person is under a moral obligation to do an act, and another person does it without his request, a subsequent promise to pay will be binding^d. Therefore, where a pauper

^b 1 Roll. Abr. 11. (Q) pl. 6.
^c Hayes v. Warren, Str. 933.

^d Watson v. Turner, Bull. N. P. 129.
147. 281.

(9) Because the defendant having derived a benefit, and afterwards agreed to pay for it, the court would have *implied* that the consideration was executed *at his request*.

(10) Sir J. Burrow says, that, according to his note of Hayes v. Warren, the court reversed the judgment of C. B. because it did not appear, that the consideration was for the benefit, or at the request, of the defendant. See Pillans v. Mierop, 3 Burr. 1671. where Wilmot J. is reported to have said, that the case of Hayes v. Warren was a strange and absurd case,

was suddenly taken ill, and an apothecary attended her without the previous request of the overseers, and cured her, and afterwards the overseers promised payment, it was holden good, for they were under a moral obligation to provide for the poor (11).

But, although a moral obligation is a good consideration for an express promise, it has never been carried further, so as to raise an implied promise in law. Hence where the parish officers of A. laid out money in providing medical assistance and other necessities for a pauper^e, who was taken

e *Atkins v. Banwell*, 2 East, 505.

(11) I cannot forbear transcribing a part of the ingenious remarks, before alluded to, on this and the following case:—"The case of *Watson v. Turner*, Bull. N. P. 147. has sometimes been cited in support of what has been supposed to be the general principle laid down by Lord Mansfield, (viz. that a moral obligation is a sufficient consideration for an express promise) because in that case overseers were held bound by a mere subsequent promise to pay an apothecary's bill for care taken of a pauper; but it may be observed, that this was adjudged not to be *nudum pactum*, for the overseers are bound to provide for the poor, which obligation being a *legal* obligation distinguishes the case. Indeed, in *Atkins v. Banwell*, 2 East, 505. that distinction does not seem to have been sufficiently adverted to, for *Watson v. Turner* was cited to shew that a mere moral obligation is sufficient to raise an *implied* assumpsit; and though the court denied that proposition, yet Lord Ellenborough observed, that the promise given in the case of *Watson v. Turner*, made all the difference between the two cases, without alluding to another distinction which might have been taken, viz. that though the parish officers were bound by law in *Watson v. Turner*, the defendants in *Atkins v. Banwell* were not so bound, because the pauper had been relieved by the plaintiffs as overseers of another parish, though belonging to the parish of which the defendants were overseers." 3 Bos. & Pul. 250, 251. It appears that the case of *Watson v. Turner* may be supported on strict legal principles, without resorting to the doctrine of moral obligation, of which not a trace can be found in the older cases. The defendants, being bound by law to provide for the poor of their parish, derived a benefit from the act of the plaintiff who afforded that assistance to the pauper, which it was the duty of the defendants to have provided; this was the consideration, and the subsequent promise by the defendants to pay for such assistance, was evidence from which it might be inferred that the consideration was performed by the plaintiff with the consent of the defendants, and consequently sufficient to support a general *indebitatus assumpsit* for work and labour performed by the plaintiff, for the defendants, at their special instance and request.

suddenly ill in the parish, and could not be removed in consequence of his illness, it was holden, that the law would not raise an implied promise in the parish of B., in which the pauper was legally settled, to reimburse the money laid out by the parish of A., although the parish of B. had notice of the pauper's illness.

A master is not liable upon an implied assumpsit to pay for medical attendance on a servant^f, who has met with an accident in his service.

In cases where, though a debt or duty remains uncanceled, yet the liability of the party to be sued is *suspended*, either by the intervention of a rule of law, or the provisions of a statute, a subsequent express promise will remove the suspension and restore the liability; for it is in the power of any party to wave an advantage which the law gives him (12).

Hence, where the holder of a bill of exchange^g had failed in giving due notice of the dishonour of the bill to the drawer, it was adjudged, that a subsequent promise by the drawer, that he would see the bill paid, would support an assumpsit.

In like manner it has been holden, that a promise to pay a debt barred by the statute of limitations^h, a promise by a bankrupt after his certificate to pay an antecedent debtⁱ, and a promise by a person of full age to pay a debt contracted during his infancy, are binding^k (13).

Motion to set aside an execution on a note^l given by a debtor discharged under the insolvent act of 21 G. 3. c. 63. for 120l. (100l. of which he had been discharged from by

^f Wennall v. Adney, 3 Bos. & Pul. 247.

^g Hopes v. Alder, B. R. M. 40 G. 3. 6 East. R. 16. n. Rogers v. Stephens, 2 T. R. 713. Lundie v. Robertson, B. R. H. 46 G. 3. 7 East. R. 231. Haddock v. Bury, Middx. Sittings, T. 3 G. 2. per Raymond C. J. S. P.

^h Hyleing v. Hastings, Lord Raym. 389.

ⁱ Trueman v. Fenton, Cowp. 544.

^k Southerton v. Whitlock, 1 Str. 690. Per Raymond C. J.

^l Best v. Barber, B. R. M. 23 G. 3. MSS. Doug. 101. n.

(12) This rule expressed in the language of Lord Mansfield, is the same as the former, viz. that a moral obligation is a good consideration for an express promise.

(13) In cases of this kind some eminent pleaders not only declare for the original cause of action, but they also insert in the declaration a count on the subsequent promise, the consideration for which they state to be the debt remaining unpaid.

the act, but in consideration of the loan of 20l. more, he had given a note for the whole) and to restore the goods taken under the *fiat facias*: Lord Mansfield C. J. after the case had been considered, said, that there was a difference between the case, where the debt was destroyed, and where it remains, but the remedy only taken away by the statute: in cases on the statute of limitations, there is not required any consideration for reviving the promise; nor is there in this case, except the conscientious obligation, which is a good consideration. There is not any difference between cases of insolvency and bankruptcy. Buller J. mentioned a case of this nature before Lord Hardwicke, chancellor. 1 Atk. 255. (14). Rule discharged.

It must be observed, that a subsequent promise will not operate so as to revive a void security^m.

It will be proper also to remark, that if the subsequent promise be conditionalⁿ, it is incumbent on the plaintiff to shew the condition performed: as if a bankrupt after obtaining his certificate, promise to pay a prior debt when he is able, the plaintiff must prove the ability of the defendant to pay at the time of the action brought on the subsequent promise.

The Agreement must be legal.—Having, in the preceding pages, attempted to explain the nature of the consideration, I shall proceed to the examination of another general principle relative to the agreement, namely, that in order to maintain an assumpsit, the agreement must be legal; that is,

^m Cockshott v. Bennett, 2 T. R. 763.
ⁿ Besford v. Saunders, 2 H. Bl. 116.

per Gould and Heath Js. dissent.
 Lord Loughborough C. J.

(14) A. formerly a trader in Holland, failed there, upon which there was a *cessio bonorum*. He came to England, and having procured an appointment as governor of a settlement abroad, belonging to the African Company, applied to the petitioner to be his security to the company, and advance him a sum of money, who agreed to it, provided A. would give him a bond comprising the remainder of an old debt due before the *cessio bonorum*, as well as the further sum advanced, which was done accordingly. A. becomes a bankrupt, and the commissioners doubting whether the petitioner ought to be admitted a creditor for the whole money, he made an application to the chancellor for that purpose; Lord Hardwicke, chancellor, was of opinion, that he was entitled to be admitted a creditor for the whole money upon his bond. *Ex parte Burton*, 1 Atk. 255.

1st. It must not contravene any rule of the common law, the express provisions of any statute^o, or the general policy of the law.

It has been observed that the two essential parts in every parol agreement, are the consideration and the promise. If either of these be illegal, or if part of the entire consideration be illegal^p, or if the promise be to do two or more acts, one of which is illegal^q, an action cannot be maintained for a breach of the agreement.

Hence where the *consideration* was, that the plaintiff would procure the defendant to be presented and instituted to a chapel^r, which was a donative in the king's gift, it was adjudged illegal, on the ground of its being simony, and therefore incapable of supporting an assumpsit. So where defendant^s, an under-sheriff, having seized the goods of J. S. under an *elegit*, sued out by the plaintiff, in consideration that the plaintiff, at the request of the defendant, would sue out another writ of *elegit*, and authorise some person to receive the goods, promised to procure the goods to be found by an inquisition, and to deliver them to the person authorised; the court were of opinion that the promise was illegal: 1. Because the seizing the goods under the first *elegit* was ill, for want of an inquisition, and it differed from a *fi. fa.* so that the defendant was a trespasser *ab initio*, and this promise was to make good his own wrong; 2. It was the duty of the sheriff to return the jury, who ought to be impartial; but this promise bound him contrary to the duty of his office; and although one part of the promise was legal, yet that depending on the illegal part vitiated the whole.

So where a person promised to indemnify a goaler^t, if he would permit a prisoner to escape out of execution; it was adjudged, that an action could not be maintained for a breach of the promise; because the consideration, namely, the suffering a prisoner in execution to escape, was against law.

By stat. 24 G. 2. c. 40. (passed for the purpose of restraining the retailing of distilled spirituous liquors, and thereby to check the immoderate drinking of those liquors by the lower class of the community) s. 12. it is enacted "that no person shall maintain any action for any debt or demand,

^o Fetherstone and Hutchins, 3 Leon. 222.

^p *Car. Jac.* 102.

^q *T. Jones*, 24.

^r *Mackaller v. Todderick*, *Cro. Car.* 337. 353. 361.

^s *Morris v. Chapman*, *T. Jones*, 24. *Carter*, 223. *S. C.*

^t *Martin v. Blithman*, *Yelv.* 197. See also *Sherley v. Packer*, 1 *Roll. B.* 313. to the same effect.

“ for any spirituous liquors, unless such debt has been *bond fide* contracted at one time, to the amount of 20s. or upwards; nor shall any item in any account for distilled spirituous liquors be allowed, where the liquors delivered at one time, and mentioned in such item, shall not amount to 20s. at the least, without fraud; and where no part of the liquors sold or delivered shall have been returned or agreed to be returned directly or indirectly.”

In an action for use and occupation of part of a house, and for goods sold and delivered^u, it appeared that the plaintiff was a liquor-merchant, and the defendant took one side of a house belonging to him, the other side being occupied by one Eaton, who sold liquors on the account of the plaintiff. The defendant kept an eating-house, and the liquors consumed by the customers there were had from Eaton as they were wanted. Many of the items in the bill for liquors were under 20s. It was objected, that the plaintiff could not recover for those items; but Lord Kenyon thought this case did not fall within the mischiefs intended to be remedied by this statute, the intent of which was to prohibit the sale of such small quantities to the consumer. This was done for the purpose of preventing the pernicious effects of dram drinking, which had been found extremely injurious to the lower orders of society. In the present case the liquors were not sold to the defendant for his own consumption, but for the use of the guests resorting to his house in the way of his trade, and therefore not within the statute.

In assumpsit for goods sold and delivered, it appeared that the defendant had run up a score for grog, beer, and herrings, consumed by him at a public-house kept by the plaintiff. It was objected, that the demand for the grog could not be sustained, being illegal within the preceding statute. Thomson B. was of this opinion, observing, however, that the statute was confined to spirituous liquors. The plaintiff recovered for the residue of his demand^v.

An action was brought to recover the price of a quantity of bricks sold by the plaintiff, a brick-maker^y, to the defendant. It appeared that the bricks had been selected by the defendant, but upon being measured they were found to be of less dimensions than the stat. 17 G. 3. c. 42. requires. It was holden, that the plaintiff could not recover; the policy of the statute being to protect the purchaser of this

^u Jackson v. Attrill, Peake's N. P. C. 180. ^x Gilpin v. Rendle, Devonshire Lent Ass. 1809. M. S.

^y Law v. Hodson, 11 East, 300.

article against the fraud of the seller. N. It did not appear, that the defendant bought the bricks knowing them to be under size.

A promise not to use a trade in a particular place is legal^a. So a contract entered into by a practising attorney^b, that he would relinquish and make over to B. and G. two other attorneys, his business as an attorney, as far as respected his practice in the profession within London, and 150 miles from thence, and all his business as agent for any attorney, and that he would recommend his clients and permit B. and G. to use his name in the business, has been holden valid.

Of Agreements contrary to public Policy.—The defendant, in consideration that the plaintiff, who was master-joiner in one of his Majesty's dock-yards, would procure himself to be superannuated, undertook, in case he, defendant, should succeed the plaintiff as master-joiner, to allow him the extra pay from the yard books^c. This agreement, having been made without the knowledge of the navy board, to whom the appointment belonged, was holden void, on the ground that it was contrary to public policy. So where A. through the interest of B. was appointed to the office of customer of Carlisle^c, having previously signed an agreement that his name was made use of *in trust for B.*, and that he would appoint such deputies as B. should nominate, and would empower B. to receive the fees of the office to his own use; this agreement was holden void, first, as being against the principles of the common law, inasmuch as the public was abused and the king deceived: and secondly, because the agreement was in violation of the statutes, (12 R. 2. c. 2. and 5 & 6 Edw. 6. c. 16.) (15) which were made to guard against evils of this nature. On the same ground it was holden, that upon an agreement for the sale (by the owner) of the command of a ship in the service of the East

^a Broad v. Jollyfe, Cro. Jac. 596.
^b Bunn v. Guy, 4 East's R. 190.

^b Parsons v. Thompson, 1 H. Bl. 323.
^c Garforth v. Fearon, 1 H. Bl. 327.

(15) This statute of Edw. 6. prohibits the sale of certain offices, which are specified in the second section. With respect to offices under government not mentioned in this statute, it has been decided, that they cannot be sold. But there are some offices which may be the object of sale, if the sale takes place under the authority and with the consent of those who have the power of appointment, as commissions in the army, &c. Per Kenyon C. J. and Lawrence J. 8 T. R. 92. 94.

India Company^d, made without the knowledge and against the bye laws of the company, an action could not be maintained.

A promise was made by the defendant^e, a friend of a bankrupt, when he was on his last examination, that in consideration that the assignees and commissioners would forbear to examine the bankrupt, concerning certain sums of money with which he was charged, that he, defendant, would pay those sums; the consideration was holden void, being contrary to the policy of the bankrupt laws.

An agreement by the payee of a bill of exchange to discharge a person liable upon it^f, in consideration that the latter would not move the Court of King's Bench against him (the payee), for a misdemeanor, is illegal.

A number of bleachers^g, in the county of Lancaster, finding that losses to a considerable amount had been incurred by them from their not being entitled to retain goods put into their hands for a general balance, came to an agreement that they would not receive the goods of any person, who would not consent that they should be retained for a general balance that might happen to be due to them. This agreement came to the knowledge of J. S. who afterwards sent a quantity of goods to A. one of these bleachers, for the purpose of being bleached. J. S. became a bankrupt. The assignees demanded the goods, but the bleacher insisted that he had a lien on the goods for what remained due to him for his work and labour upon other goods delivered to the bankrupt before the bankruptcy. It was contended on the part of the assignees, that the object of the agreement was to create a lien in cases where none existed before; and though an individual might impose such terms on his customers, yet it was not competent to a class of men to do it; and that it was against public policy to permit combinations of this sort to avail. But the court were of opinion, that as the convenience of commerce and natural justice were on the side of liens, this agreement was legal, its object being merely to enforce that which the law considered as equitable; more especially as it was made by persons who had an option either to work for this or that person as they chose.

2dly. The agreement must not be contaminated with, or arise out of, an illegal transaction.

^d Blachford and another v. Preston, 8 T. R. 19. ^f Pool v. Bousfield, 1 Camp. N.P.C. 55. ^g Kirkman v. Shawcross, 6 T. R. 14.
^e Derot v. Wallace, 3 T. R. 17.

Hence, where an agreement was made between two parties^h, subjects of this country, for the sale and delivery of goods in Guernsey, for the purpose of being smuggled into England; it was holden, that the vendor could not maintain an action for the value of the goods. And in a subsequent case, it was decidedⁱ, that the circumstance of the vendor being an inhabitant of Guernsey would not vary the case, for he was still a subject of this country (16).

So where the vendor was concerned in giving assistance to the vendee to smuggle the goods^k, by packing them in the manner most suitable for, and with the intent to aid that purpose, although the vendor was a foreigner, resident abroad, and the sale and delivery of the goods were completed abroad, it was holden, that the vendor could not resort to the laws of this country to give effect to his agreement. But the mere knowledge of the vendor^l, that the goods were purchased for the purpose of being smuggled is not sufficient to prevent his recovering in an action for the price of the goods, if the vendor was a foreigner resident abroad, and the sale and delivery was completed abroad.

By the statute 6 G. 1. c. 18. s. 12. it is enacted, that all policies of insurance on ships, &c. at sea, or going to sea, made by any corporation (other than the two corporations therein mentioned) or by persons acting in partnership, shall be void.

A. and B.^m agreed to become partners as underwriters of policies for the assurance of ships at sea, in the profits as well as losses arising therefrom, but that the name of A. only should be used in the subscription of such policies. In pursuance of that agreement, policies were underwritten, and the premiums received by B. An action having been brought by A. to recover his moiety of the premiums, it was holden that it would not lie; for the plaintiff's claim arose out of a transaction which was illegal, and therefore the court would not give effect to it.

So where A. and B. were engaged in a partnership of the

^h Biggs v. Lawrence, 3 T. R. 454.

ⁱ Clugas v. Penaluna, 4 T. R. 467.

^k Waymell v. Read and another, 5 T.

R. 599. cited by Kenyon C. J. Van-

dyck v. Hewitt, 1 East's R. 98.

^l Holman v. Johnson, Cowp. 341.

^m Booth v. Hodgson, 6 T. R. 405.

(16) "A man may be born out of the realm, viz. of England, as in Ireland, Jersey, and Guernsey, &c. and yet as he is not born out of the ligeance of the king, he is not an alien." 1 Inst. 129. b.

same description with that mentioned in the preceding case, and A. paid the whole of the losses; it was holden, that A.^a could not maintain an action against B. to recover a share of the money that had been so paid.

In like manner it has been holden, that in a case of this kind, the underwriters cannot maintain any action against the assured for the recovery of the premiums^c.

Where one of two partners had been compelled to pay the whole of a loss^d, and the other partner had paid his moiety of the loss into the hands of a broker; it was holden, that this moiety could not be recovered from the broker by the partner, who had paid the whole loss (17).

If an officer permit a prisoner to go at large^e, in consequence of which he (the officer) is obliged to pay the creditor; the officer cannot maintain an action for money paid against the debtor; for he cannot raise a cause of action by the payment of money for another, on account of his own breach of duty (18).

Of fraudulent Agreements.—3dly. The agreement must be fair and honest, and not entered into for a fraudulent purpose; for fraudulent contracts are considered in the

^a Mitchell v. Cockburne, 2 H. Bl. 379.

^b Aubert v. Maze, 2 Bos. and Pul. 371.

^c Branton v. Taddy, 1 Taunton's R. 6.

^d Sullivan v. Greaves, Park's Ins. 8.

Per Kenyon C. J. who afterwards

stated this case to the judges of the King's Bench, who concurred in the same opinion.

^e Pitcher v. Bailey, 8 East, 171.

(17) The defendant, being a broker, effected an insurance for the plaintiff, a British subject, on goods from Ostend to the East Indies, on board an Imperial ship, which insurance was illegal by 7 G. 1. stat. 1. c. 21. s. 2. The ship having been lost, the underwriters paid the amount of the insurance to the defendant, who, without any intimation from them to retain the money, refused to pay it over to the plaintiff. An action for money had and received having been brought, it was holden, that the defendant could not insist on the illegality of the contract as a defence, and the plaintiff recovered. Tenant v. Elliott, 1 Bos. & Pul. 3.

(18) But where an officer discharged a prisoner, arrested on *mesne process*, on payment of the sum sworn to and costs, and was afterwards obliged to pay the residue of the debt, it was holden, by Buller J. that as the officer had not been guilty of any improper conduct, and as he was by law compellable to pay the *whole* debt, he was entitled to recover against the defendant for so much money paid to his use. Cordron v. Lord Masserene Peake's N. P. C. 143.

same light as illegal contracts, and consequently an action cannot be maintained for the breach of them.

The defendants, being indebted to the plaintiffs and other creditors, and being insolvent, assigned all their effects in trust to pay 11s. in the pound to their creditors, to which all the creditors consented, and signed the deed of trust, except the plaintiffs, who refused to sign and to take any composition, unless the defendants would give them a note for the remaining 9s. in the pound; the defendants accordingly gave a note to that amount, whereupon the plaintiffs signed the deed. It appeared, that if the plaintiffs had not signed, the rest of the creditors would not have signed the deed. An action having been brought on the note, a verdict was found for the defendants; on an application made to the court for a new trial, it was refused; Lord Kenyon C. J. observing, that the foundation of his opinion was, that the temptation to give this note was a fraud on the creditors who were parties to the contract, on which their debts were to be cancelled in consideration of receiving a composition. The note preceded the execution of the deed; all the creditors being assembled for the purpose of arranging the defendant's affairs, they all undertook and mutually contracted with each other, that the defendants should be discharged from their debts after the execution of the deed. Then the plaintiffs, in fraud of that engagement, entered into a contract with the defendants, which prevented their being put into that situation, which was the inducement to the other creditors to sign the deed, and to relinquish a part of their demands.

The same principle was established in *Jackson v. Lomas*, 4 T. R. 166.

So where A. having given B. a sum of money for goods in advancement of C. a secret agreement, between B. and C. that C. should pay B. a further sum for the goods, was holden to be void, on the ground that it was a fraud upon A.

So where a trust deed was proposed to the creditors of an insolvent, whereby they all engaged to accept payment of their debts by six instalments, the second, third, and fourth of which were to be guaranteed by collateral security, and the fifth and sixth were to remain on the single security of the insolvent; several of the creditors refused to sign, unless the plaintiffs did; in order to induce the plaintiffs to sign

r *Cockshott v. Bennett*, 2 T. R. 763.
 recognized by Lord Ellenborough in
Steinman v. Magnus, 11 East, 394.
 s *Jackson v. Duchaire*, 3 T. R. 551.

t *Leicester v. Rose*, 4 East's R. 372.
 recognized by Lord Eldon C. in exp.
Sadler and anr. L. 1. H. Apr. 11-09.

the deed, the defendant, at the instance of the insolvent, agreed that he (the defendant) would procure the plaintiffs a collateral security for the fifth and sixth instalments within a given time, whereupon the plaintiffs signed the trust deed, and the other creditors, who had before refused, signed also, but without any knowledge of the agreement between the plaintiffs and defendant: an action having been brought for the non-performance of this agreement, it was holden to be a void agreement, on the ground that it was a fraud against the other creditors; and although, in this case, the stipulation by the plaintiff was for a further security, and not for more money, there was not any difference, in substance, whether a creditor stipulated for that, which he thought would produce him money more certainly, or for a larger sum than he had agreed to take in common with the other creditors; that it was equally a fraud upon the other creditors to stipulate for either.

Immoral Agreements.—4thly. If the agreement be of such a nature, that the carrying it into effect, and enforcing it, will give a sanction and encouragement to immorality, an action cannot be maintained for the violation of it. This position is founded on the maxim, *ex turpi causâ non oritur actio*, or in the elegant paraphrase of Lord Mansfield, justice must be drawn from pure fountains.

In an action for use and occupation of a lodging^a, where it appeared that the lodging was let to the defendant for the purposes of prostitution, and with a knowledge on the part of the plaintiff of that fact, it was holden, that the action was not maintainable^x. So where an action was brought against the defendant for board and lodging^y, and it appeared in evidence, that the defendant was a lady of easy virtue, that she had boarded and lodged with the plaintiff who had kept a house of bad fame, and who, besides what she received for the board and lodging of the unfortunate women in her house, partook of the profits of their prostitution; Lord Kenyon C. J. was of opinion, that such a demand could not be heard in a court of justice. On the same principle it was holden, that an assumpsit would not lie to recover the value of prints of an immoral or libellous tendency, which had been sold and delivered by the plaintiff to the defendant^z. But in an action to recover the amount of a bill

^a *Crisp v. Churchill*, C. B. E. 34 G. 3.
Per Eyre C. J.

^x *Girarday v. Richardson*, 1 Esp. N. P. C. 12. S. P. per Kenyon C. J.

^y *Howard v. Hodges*, Middx. Sittings,

B. R. before Lord Kenyon Ch. J. 2 Dec. 1796.

^z Per Lawrence J. Sittings Hil. 42 G. 3 B. R. 4 Esp. N. P. C. 97.

delivered for washing done by the wife of the plaintiff^a, where it appeared in evidence, that the defendant was a prostitute, and that the articles washed consisted principally of expensive dresses, in which the defendant appeared at public places, and of gentlemen's night-caps, which were worn by the persons who slept with the defendant, with all which circumstances the plaintiff was acquainted; it was holden, that the use to which the defendant applied the linen could not affect the contract, and that the plaintiff was entitled to recover.

The same doctrine was laid down by Lord Ellenborough in *Bowry v. Bennet*, 1 Camp. N. P. C. 348. where an action was brought against a prostitute to recover the value of some clothes which had been furnished by the plaintiff. The C. J. said, that the mere circumstance of the defendant being a prostitute within the knowledge of the plaintiff, would not render the contract illegal. In order to defeat the action, it must be shewn that the plaintiff expected to be paid out of the profits of the defendant's prostitution, and that he had sold her the clothes in order to carry it on.

II. *Of the General Indebitatus Assumpsit.*

HAVING premised that the rules laid down in the preceding section, govern the action of assumpsit in both its forms, that is, whether the plaintiff sets forth the agreement, for the breach of which he complains, specially, and declares, as it is technically termed, on a special assumpsit; or whether, the nature of his case permitting it, he adopts the general form of an *indebitatus assumpsit*, I shall proceed to an explanation of the latter form.

General Indebitatus Assumpsit.—The general *indebitatus assumpsit* is in the nature of an action of debt, and owes its introduction into general use to the circumstance of the defendant not being permitted in this form of action to wage his law (19). It may be considered as a general rule, that

^a *Lloyd v. Johnson*, 1 Bos. and Pul. 340.

(19) See *Slade's case*, 4 Co. 91—95 b. and the judicious remarks of Professor Wooddeson, in the third volume of his *Systematical View of the Laws of England*, p. 168. n. c.

an *indebitatus assumpsit* will not lie in any case, but where debt will lie^b (20). It is observable, however, that the remedy by action of debt is more extensive than the remedy by *indebitatus assumpsit*; for debt may be brought on a record or specialty, whereas the *indebitatus assumpsit* is confined to parol agreements. Hence, although the form of the general *indebitatus assumpsit* is very concise, yet it is essentially necessary to state in the declaration *for what cause the debt or duty became due*, in order that it may appear to the court to be matter whereon an assumpsit may be founded; and an omission in this respect may be taken advantage of by writ of error^c or in arrest of judgment, after verdict^d. But it is not necessary in this form of action to state the particular items constituting the debt; it is sufficient if the declaration state generally, that the defendant was indebted to the plaintiff for work and labour^e; for the agistment^f of cattle in the plaintiff's ground; for a premium^g upon a policy of assurance upon such a ship; upon an account stated^h (21); on a foreign judgmentⁱ, without stating the cause of action on which the judgment proceeded; or for money had and received^k, without stating for what cause the money was had and received.

The counts in *indebitatus assumpsit* for work and labour, goods sold and delivered, money lent and advanced, money paid, laid out, and expended, money had and received, and on an account stated, being in most frequent use, are called the general or common counts, and all or some of them are usually added to every special assumpsit, where the circumstances of the case require it; the advantage of which is this, that if the plaintiff fails in proving the special count, he may resort to evidence applicable to the common counts^l, unless the special contract remains open, still subsisting, and in force, in which case the plaintiff is precluded from recovering on the common counts^m.

^b *Hard's case*, Salk. 23.

^c Cro. Jac. 206, 207.

^d *Foster v. Smith*, Cro. Car. 31.

^e *Hibbert v. Courthope*, Carth. 276.

^f *Gardiner v. Bellingham*, Hob. 5.

^g *Fowk v. Pinsacke*, 2 Lev. 153.

^h *Homes v. Savill*, Cro. Car. 116.

ⁱ *Plaistow v. Van Uxem*, Cam. Scacc.

T. 18. Geo. 3. Doug. 5. n.

^k *Rables v. Sikes*, B. R. M. 22 Car. 2.

^l *Payne v. Bacomb*, Doug. 65 1.

^m *Hulle v. Heightman*, 2 East's R. 147. recognising *Weston v. Downes*, Doug. 23. See also *post*, under *indebitatus assumpsit*, for money had and received, Art. 11. and *Cooke v. Munstone*, 1 Bos. and Pul. N. R. 351.

(20) The authority of this rule was questioned by Lord Mansfield C. J. in *Moses v. Macferlan*, 2 Burr. 1008.

(21) In an action of *indebitatus assumpsit*, upon an account stated, it is not necessary to prove the items of the account, but

In addition to the causes of action already enumerated, it has been holden, that an *indebitatus assumpsit* will lie, for a fee due from any person who accepts the honour of knighthood, to the gentlemen ushers and daily waiter to the king^a; for fees due to an usher of the black rod^a; for a reasonable and customary fine due to the heir of the lord from a copyholder upon the death of the lord^a; for freight^a; for money due by the custom of London for scavage^a; for tolls^a; for a penalty due by the ordinances of a company for not serving the office of steward according to a bye-law^a; and, lastly, *indebitatus assumpsit* will lie on a foreign judgment^a.

But an *indebitatus assumpsit* will not lie upon a bill of exchange by the payee against the acceptor^a, because the acceptance is only a collateral engagement to pay the debt of another, namely, the debt of the drawer; nor will it lie for a wager^a, because a real consideration is wanting, and debt will not lie for a wager.

It will be proper to remark here that an *indebitatus assumpsit* will not lie on a special agreement^a until the terms of it are performed, but when that is done, it raises a duty, for which a general *indebitatus assumpsit* will lie.

In cases of this kind, *i. e.* where the terms of the special agreement have been performed, if the plaintiff, having declared on the special agreement, and also on a general *inde-*

^a *Duppa v. Gerard*, Carth. 95.

^o *Sanderson v. Brignall*, Str. 747.

^p *Shuttleworth v. Garrett*, Carth. 90.
Holt C. J. dissentient (22).

^q 1 Ventr. 100.

^r *City of London v. Goree*, 2 Lev. 174.

^s *Steward v. Baker*, 1 T. R. 618.

^t *Barber Surgeons v. Pelson*, 2 Lev. 252.

^u *Crawford v. Whittal*, Doug. 4. n. [1.]

^x *Hard's Case*, Salk. 23.

^y *Bovey v. Castleman*, Ld. Raym. 69.

^z *Gordon v. Martin*, Fitz-Gib. 303.

only that an account was stated, for that is the cause of action. Agreed per Raymond C. J. Page and Reynolds J. in *Bartlett v. Emery*, 1 T. R. 42. n. The accounting being the ground of the promise is traversable. *Dalby v. Cooke*, Cro. Jac. 234. On an account stated, the plaintiff is not obliged to prove the exact sum laid in the declaration. *Thompson v. Spencer*, B. R. E. 8 G. 3. Bull. N. P. 129. An acknowledgment by the defendant of a debt due upon any account, is sufficient to enable the plaintiff to recover upon a count for an account stated. *Knowles v. Michel*, 13 East, 249.

(22) It was admitted by the court, in this case, that debt would lie for a fine upon an admittance to a copyhold. See also *Whitfield v. Hunt*, Doug. 727. n. [† 155.] where it was holden, that a general *indebitatus assumpsit* would lie by the lord against the tenant of a customary tenement for a fine due upon admission.

bitatus assumpsit, fail in proving the special agreement, he may resort to the general count^a (23).

In an action of *indebitatus assumpsit* for goods sold and delivered^b, it appeared that the goods in question had been valued at a certain sum, for which *payment* was to be made by the defendant *in three months after the 15th of September, 1802*, (the day on which the bargain was concluded) *by a bill of two months*. The action was commenced in Hilary Term, 1803, before the expiration of five months from the day on which the contract was made. The court of King's Bench (dissentiente Ellenborough C. J.) were of opinion, that the action was prematurely brought on the implied assumpsit before the expiration of the credit, and that a special action of assumpsit was the mode in which the defendant ought to have been sued for the not giving at the end of three months a bill at two months, in which action the plaintiff would have been entitled to recover damages against the defendant for his not having given the bill, such as the loss of interest, &c. (24).

^a Leeds v. Burrows, 12 East, 3.

^b Mussen v. Price, 4 East's Rep. 147.

(23) "If A. declare upon a special agreement, and likewise upon a *quantum meruit*, and at the trial prove a special agreement, but different from that which is laid in the declaration, he cannot recover on either count: not on the first, because of the variance; nor on the second, because there was a special agreement; but if he prove a special agreement and the work done, but not pursuant to such agreement, he shall recover upon the *quantum meruit*, for otherwise he would not be able to recover at all." Bull. N. P. 139. Str. 638.

"I apprehend the rule to be this: where a party declares on a special contract, seeking to recover thereon, but fails in his right so to do altogether, he may recover on a general count, if the case be such; that, supposing there had been no special contract, he might still have recovered for money paid, or for work and labour done. As in the case of a plaintiff suing a defendant as having built a house for him according to agreement; there, if he fail to prove that he has built it according to agreement, he may still recover for his work and labour done." Per Sir J. Mansfield, delivering the opinion of the court in Cooke v. Munstone, 1 Bos. and Pul. N. R. 354. "If a man agrees to build for another a house to be paid for it, and afterwards builds the house, in this case he has two ways of declaring, either upon the original executory agreement, as to be performed *in futuro*, or upon an *indebitatus assumpsit*, or *quantum meruit*, when the house is actually built, and the agreement executed." Per Denison J. Alcorn v. Westbrook, 1 Wils. 117.

(24) Care must be taken to distinguish cases of this kind from the common case in which goods are sold, and a bill taken in payment payable at a future day, but *without any express agreement*

So where goods were purchased by the defendant of the plaintiff^c, to be paid for by a bill at two months, which bill was accordingly drawn upon the defendant for the amount of the goods, and tendered for acceptance, which was refused; an action of *indebitatus assumpsit* for goods sold and delivered having been brought before the expiration of the two months, it was holden by the Court of Common Pleas, on the authority of the preceding case, that the action could not be sustained (25).

But it must be observed, that the plaintiff is entitled to recover for goods sold and delivered upon credit for a certain time^d, if it appear by a special memorandum that the bill was filed on a day subsequent to the expiration of the credit, although the writ appear to have issued before (26).

c *Dutton v. Solomonson*, 3 Bos. & Pul. 595. d *Swancott v. Westgarth*, 4 East's R. 75.

for time for the payment of the goods; in this last-mentioned case, if the bill is dishonoured, the drawer may be sued immediately upon the original cause of action without any regard being had to the time which the bill has to run; for there being no agreement as to time, the party takes the bill as payment, and, therefore, if it turn out to be good for nothing, the creditor has not received that which the other undertook to give him, and may therefore pursue his remedy immediately. *Stedman v. Gooch*, 1 Esp. N. P. C. 5. *Puckford v. Maxwell*, 6 T. R. 52. *Owenson v. Morse*, 7 T. R. 64. A debtor is not discharged by giving a check which produces nothing, although payment in cash may have been previously tendered; and the circumstance of the check being given by the agent of the debtor, who is at the time indebted to his principal in a larger amount, makes no difference. *Everett v. Collins*, 2 Camp. N. P. C. 515.

(25) Lord Alvanley C. J. said, "that he should recommend to any person bringing an action in a case of this kind, [even after the expiration of the two months] to declare on the special agreement, as well as on the general count; for he entertained great doubts, whether, even at the end of the two months, an *indebitatus assumpsit* would lie, if it did not lie before the expiration of that period." But see 4 East's R. 75. See also *Brooke v. White*, 1 Bos. & Pul. N. R. 330. cont.

(26) In like manner where a declaration is entitled generally of the term, in which case it refers to the first day of the term, and evidence is given of a cause of action accruing after that day; yet, if upon the production of the writ it appears that the writ was sued out after the cause of action, no advantage can be taken of the mistake in the title of the declaration. *Rhodes v. Gibbs*, Surrey Sum. Ass. 1804, Heath J. 5 Esp. N. P. C. 163.

A. agreed to deliver to B. 100 bags of hops at a certain price per cwt. by a certain time^e. A. having delivered twelve bags before the stipulated time, and demanded payment, which was refused, immediately commenced an action for the price of the bags delivered. It was holden, that as the contract was entire and could not be split, the plaintiff was not entitled to bring an action, until the whole quantity was delivered, or until the time for delivering the whole had arrived.

A collateral undertaking must be declared on specially; as where B. undertook in writing to A. to answer for the payment of certain goods to be sent by him to C., it was holden^f, that A. could not maintain an *indebitatus assumpsit* against B. for the price of the goods sent to C.; but that he ought to have declared specially on the guaranty.

The general *indebitatus assumpsit* for money paid, and for money had and received, being those forms of action which are of more extensive application than any other known in the law, I shall proceed to inquire in what cases they may be brought, beginning with the *indebitatus assumpsit* for money paid.

Of the Indebitatus Assumpsit for Money paid.—Where a person has laid out his own money for the use of another, either with the express or implied consent of such other person, the law implies a promise of repayment, for a breach of which an *indebitatus assumpsit* for money paid, laid out, and expended, may be maintained.

As where one person is surety for another, and compellable to pay the whole debt^g, and the surety is called upon to pay, it is money paid to the use of the principal debtor, and may be recovered against him in an action for money paid, even though the surety did not pay the debt by the desire of the principal (27).

^e *Waddington v. Oliver*, 2 Bos. & Pul. N. R. 61.

^f *Mines v. Sculthorpe*, 2 Camp. N. P. C. 215.

^g Per Kenyon, C. J. 3 T. R. 310.

(27) Upon this subject, Buller J. in *Toussaint v. Martinnant*, 2 T. R. 105. observed, that “in ancient times an action could not be maintained at law, where a surety had paid the debt of his principal; and the first case, in which the plaintiff succeeded, was before Gould J. at Dorchester, which was decided on equitable grounds.”

Although the preceding observation has been cited without remark, in a modern case, by a truly learned and most accurate judge

So where *two* persons are sureties for another^h, and the obligee compels one of the sureties to pay the whole debt, such surety may maintain an action against his co-surety, and thereby compel him to contribute his proportion towards the payment of the debt. N. In such case, it does not appear to be necessary, that the insolvency of the principal debtor should be proved.

But where it appeared that one of two sureties had been prevailed on to become a surety at the instance of the otherⁱ, and the other had been compelled to pay the debt; Lord Kenyon would not permit him to call on his co-surety for contribution, more especially as he had taken a bill of sale from the principal debtor in order to protect himself.

This action may be maintained by the bail against their principal^k, for the recovery of such sums of money, as they, from their situation as bail, and in order to secure themselves, have been fairly and necessarily obliged to expend. The bail may surrender their principal in their own discharge, and for their own security; consequently, if the principal absconds, and the bail incur expenses in sending after him and securing him, in order that he may be surrendered, such expenses may be recovered in this action against the principal.

^h Admitted in *Cowell v. Edwards*, 2 Bos. & Pul. 268. and by *Ld. Kenyon*, C. J. in the following case.

ⁱ *Turner v. Davies*, 2 Esp. N. P. C. 478.

^k *Fisher v. Fellows*, 5 Esp. N. P. C. 171.

now on the bench, viz. by Mr. J. Lawrence, in *Cowley v. Dunlop*, 7 T. R. 568, I am inclined to think that the position is not strictly correct. From a MS. note in my possession, the same doctrine appears to have been laid down by Lord Mansfield C. J. in the year 1757, six years before Sir H. Gould was appointed a judge of the Court of Common Pleas. The case alluded to was that of *Decker v. Pope*, London Sitings, 9th July, 1757. It was an action brought by an administrator *de bonis non* of a surety, who, at defendant's request, had joined with another friend of defendant's in giving bond for the payment of the price of some goods that were sold to defendant; and the surety having been obliged to pay the money, the administrator declared against defendant for so much money paid to his use; Lord Mansfield directed the jury to find for the plaintiff; observing, that where a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law, and to charge the principal in an action for money paid to his use. He added, that he had conferred with most of the judges upon it, and they agreed in that opinion.

So where A., B., and C. were lessees of certain premises by deed from D.¹, to whom they covenanted to pay the rent, and B. and C. assigned their interest to A., subsequent to which assignment, and with full knowledge whereof, the plaintiff put his goods on the premises, under the care of A., where they were taken as a distress by D. for rent arrear, and the plaintiff, in order to redeem his goods, was obliged to pay the rent due, taking at the time a receipt from D.'s attorney as for so much received on account of A., B., and C.; it was holden, that the plaintiff might maintain an action for money paid against A., B., and C., on the ground that the three defendants were liable to the landlord for the rent in the first instance, and as, by the payment made by the plaintiff, all the three were released from the demand of the rent, and as such payment was not a voluntary but a compulsory payment, because the plaintiff could not have relieved himself from the distress, under these circumstances the law would imply a promise by the three defendants to repay the plaintiff.

In the preceding case it will be observed that the money paid was the plaintiff's money^m; this is requisite for the maintenance of the action; for where A. let a house to B., which B. underlet to C., and A. distrained the goods of C. for rent due from B., which goods were afterwards sold by virtue of the stat. 2 W. & M. sess. 2. c. 5. s. 2, and the money arising from the sale paid over by the auctioneer to A.; it was holden that C. could not maintain an action against B. for money paid to his use, because the money in question never was the money of C. but the money of the landlord; for the moment the goods were converted into money, that money became an executed satisfaction in the landlord for the rent arrear; and C. the tenant was only interested in the surplus proceeds, if any, of the goods.

It is observable, that the mere circumstance of one person having received an advantage from the payment of money by another, is not sufficient to raise an assumpsit against the former; the consent of the party, either express or implied, is essentially necessary to the support of the action.

In an action for money paidⁿ, laid out, and expended by the plaintiffs to the use of the defendants, it appeared that

¹ Exall v. Partridge and others, 8 T. R. 303.

^m Moore v. Pyrke, 11 East, 52.

ⁿ Stokes and another, Overseers of St. Vedast's, v. Lewis and another, Overseers of St. Michael le Quern, London, 1 T. R. 20.

by stat. 22 & 23 Car. 2. c. 11. the parishes of St. Vedast's and St. Michael le Quern were united; and that, since that time, one set of officers had served for the two parishes, the election of whom had always been made at a joint vestry; that only nine vacancies in the office of sexton had happened since, all which had been filled up agreeably to this custom; that in the year 1759 the sexton's salary was fixed at 20l. per annum, which was agreed to be paid equally by both parishes; that the overseers of St. Vedast's had paid the sexton who was last chosen the whole sum, to recover a moiety of which this action was brought. The defence set up was, that the last election of a sexton was not a joint one, and that the parish of St. Michael claimed a right of choosing a separate sexton for themselves, of which they had given notice to the other parish. Lord Mansfield C. J. *This action must be grounded either on an express or implied consent; but here is neither.* Buller J. If this were held to be a joint obligation, it would be saying, that the sexton might bring his action against one of the parishes for the whole sum, which is not the case.

In like manner it was holden, that a broker^a (who had contracted with third persons for the sale of stock at a future day by the authority of his principal, but without disclosing the name of his principal, who afterwards in consequence of the rise of the stocks refused to make good his bargain) could not, by paying the difference to the persons to whom the stock had been sold, maintain an action for money paid on an implied assumpsit against his principal for the amount.

If an auctioneer is employed to sell an estate by auction^b, and he undertakes to conduct the auction so as to avoid incurring the duty if the estate is not sold, but through mistake transacts the business so that the duty attaches, which he is obliged to pay, the law will not raise an implied promise on the part of the employer to reimburse the auctioneer the money paid for the duty, which has been thus incurred through his own blunder.

An officer guilty of a breach of duty cannot recover money which he has paid in consequence of it, though for the benefit of the defendant^c.

If A. recover in an action founded on *tort* against B. and C., and levy the whole damages on B., B. cannot maintain

^a Child v. Merley, 8 T. R. 690.
^b Capp v. Topham, 6 East, 392.

^c Pitcher v. Bailey, 8 East, 171.
^d Merryweather v. Nixan, 8 T. R. 186.

an action against C. upon an implied assumpsit for a reimbursement of a moiety; for a contribution cannot be claimed as between joint wrong-doers (28).

A. having recovered a judgment against a trader^s, and taken out execution, a levy was made on the goods of the trader, but after he had committed an act of bankruptcy and the money levied was paid over to A. An action of trover was afterwards brought by the assignees against A., the sheriff, and the bailiff, in which damages were recovered; and these damages, together with the costs, were paid by the bailiff: it was holden, that there was no implied promise on the part of A. to indemnify the bailiff, or to contribute to the damages and costs in the action of trover; but that the bailiff might, in an action for money had and received, recover the levy-money, being money paid under a mistake to A. and the bailiff being answerable for it to the assignees.

In a case where there were three assignees of a bankrupt's estate who had acted in the commission, and two of them paid the solicitor's bill^t, it was holden that the two could not maintain a joint action against the third for contribution, but that each ought to bring a separate action. So where three had entered into a joint and several bond of indemnity to a sheriff^u, for the protection of their separate interests, and the sheriff had compelled two of them to pay the whole sum, it was holden that they could not maintain a joint action against the third for contribution.

Of the Indebitatus Assumpsit for Money had and received.—The action for money had and received is founded on all the equitable circumstances of the case between the parties; and, consequently, in order to recover in this form of action, the plaintiff must shew that he has equity and conscience on his side. From the following positions it may be collected in what cases this action may be maintained.

1. If I pay money to a person who claims an authority

^s Wilson v. Milner, 2 Camp. N. P. C. 452. ^t Brand and another v. Boulcott, 3 Bos. & Pul. 235.

^u Kelby v. Vernon, 5 Esp. N. P. C. 194.

(28) A different rule holds in the case of a joint judgment against several defendants in an action of assumpsit. Per Lord Kenyon C. J. S. C. So an action of assumpsit lies by a ship owner to recover from the owner of the cargo, his proportion of a general average loss incurred by sacrificing the tackle belonging to a ship on an extraordinary emergency for the benefit of the whole concern. Birkley v. Presgrave, 1 East's R. 220.

to receive it, but really has not any such an authority^x, and afterwards I am compelled to pay it again to the person lawfully entitled to receive it, an action for money had and received will lie against the person unjustly receiving the money (29).

2. Where a person has usurped an office belonging to another^y, and taken the known and accustomed fees of office, an action for money had and received will lie at the suit of the party really entitled to the office against the intruder for the recovery of such fees.

Hence this action is frequently brought, in the place of an assize, to try the right to offices^z. It must be observed, however, that this action will not lie to recover gratuitous donations given to the intruder, as money given by strangers for shewing a church; for an assize will not lie for a gratuity.

An action for money had and received^a does not lie by the nominee of a perpetual curacy for the profits thereof, until he has obtained the bishop's licence; for, in curacies, the party is not in possession, until licence. But, in the case of a donative, the party is in full possession immediately on the nomination; and, consequently, if any other person takes the rents and profits, he may maintain an action for money had and received^b.

3. Where money, to which there was not any ground of claim in conscience, has been paid under a mistake, the party may recover it back again in an action for money had and received:

As where A.^c who was indebted to the estate of B. a bankrupt, paid the debt to his assignees without setting off, as he was entitled to do, a sum of money due to himself from the bankrupt, it was holden, that A. might recover

x *Bonnell v. Fouke*, 2 Sid. 4. See post, page 81, *Cripps v. Reade*.

y *Aris v. Stukeley*, 2 Med. 260.

z *Boyer v. Dodsworth*, 6 T. R. 681.

a *Powell v. Milbank*, M. 12. Geo. 3. B. R. 1 T. R. 399. n. 2 Bl. R. 851. S. C.

b Per Ashhurst J. in *The King v. Bishop of Chester*, 1 T. R. 403.

c *Bize v. Dickason*, 1 T. R. 285.

(29) If A. be indebted to B., and pay such debt to the attorney of a person suing A. in B.'s name, but without B.'s authority, B. may, notwithstanding, recover the debt in an action against A., whose remedy is against the attorney, although the attorney was deceived by a counterfeited warrant of attorney. *Robson v. Eaton*, 1 T. R. 62.

the money, which he had neglected to set off, in an action for money had and received against the assignees. So where an action was brought against a person upon a groundless demand^d, and the cause was compromised by the payment of the money demanded, it was holden, that money had and received would lie for the recovery of the sum so paid. But where money has been paid under the compulsion of legal process in an action, which the party might have defended successfully if he had been prepared with his evidence, this money cannot be recovered, in an action for money had and received; although such evidence be produced at the trial of the second action as shews, that the other party was not entitled to recover it in the first.

The defendant had brought an action against the present plaintiff for goods sold^e, for which the plaintiff had before paid and obtained the defendant's receipt, but not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to submit and pay the money again, and gave a cognovit for the costs. The plaintiff afterwards found the receipt, and brought an action for money had and received in order to recover back the amount of the sum so wrongfully enforced in payment. But Kenyon C. J. was of opinion, that, after the money had been paid *under legal process*, it could not be recovered back again, however unconscientiously retained by the defendant, though the case of *Moses v. Macferlan*, 2 Burr. 1009. (30) was referred to; and thereupon the plaintiff was nonsuited. On a motion to set aside the nonsuit, Lord Kenyon said, that after recovery *by process of law* there must be an end of litigation,

^d Cobden v. Keurick, 4 T. R. 432. in ^e Marriott v. Hampton, 7 T. R. 269. note.

(30) Macferlan sued Moses, in the Court of Conscience, as indorser of a small bill of exchange, and recovered against him there, in breach of an agreement in writing between them, that Moses should not be liable nor prejudiced by reason of his indorsement. Moses paid the money and brought an action in the King's Bench to recover it back, as money had and received to his use; and it was holden that the action might be maintained. See the judicious remarks of Eyre C. J. on this case in *Philips v. Hunter*, 2 H. Bl. 414. and the pointed observation with which he concluded those remarks: "I believe that judgment (the judgment in *Moses v. Macferlan*) did not satisfy Westminster Hall at the time: I never could subscribe to it; it seemed to me to unsettle foundations."

otherwise there would not be any security for any person. He could not consent therefore to grant a rule to shew cause, lest it should seem to imply a doubt. And Grose J. said, that it would tend to encourage the greatest negligence, if the court were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence. Rule refused (31).

Where a party pays money to another voluntarily, with full knowledge, or full means of knowledge, of all the facts of the case (32), the party so paying cannot recover it back again on account of his ignorance of the law :

As where an underwriter of a policy of insurance upon a ship having paid the amount of the insurance^f, as for a loss by capture, sought to recover it, on the ground that the assured had not at the time of effecting the insurance disclosed to the underwriter a material letter respecting the time at which the ship sailed; but, it being proved, that, before the loss on the policy was adjusted, all the papers, including the letter in question, had been laid before the underwriter, it was holden, that he could not recover; for every man must be taken to be cognizant of the law (33).

^f *Bilbie v. Lumley*, 2 East's R. 469.
recognised by Lawrence J. in *Lo-*

thian v. Henderson, D. P. 3 Bos. & Pal. 520.

(31) In *Barbone v. Brent* in Chanc. Trin. T. 1688, 1 Vern. 176. a bill was filed for an account, stating, that the plaintiff had bought goods of the defendant, and had paid him money in part of satisfaction, but the plaintiff having lost the receipt, the defendant had recovered the whole value at law: demurrer, because it appeared of plaintiff's own shewing that the defendant had recovered at law. For the plaintiff it was insisted, that the case stated in the bill being by the demurrer admitted to be true, the plaintiff as to the money overpaid ought to be relieved in equity. Demurrer allowed; and per North Ld. Keeper, if A. pays money in part of satisfaction, and afterwards the whole value of the goods is recovered against A. at law, the money so paid becomes money received to the use of the person who paid it, and he may recover it in an action at law.

(32) "Where a payment has been made, not with full knowledge of the facts, but only under a blind suspicion of the case, and it is found to have been paid unjustly, the party paying may recover it back again." Per Ashhurst J. in *Chatfield v. Paxton*, 2 East's R. 471. n.

(33) The defendant being tenant to the plaintiff of certain rooms at the yearly rent of twenty guineas, the plaintiff, at the expiration

The same principle was recognized in *Stevens v. Lynch*, 12 East, 38. There the drawer of a bill of exchange, with full knowledge of time having been given to the acceptor, upon a supposition that he (the drawer) remained liable, three months after the bill became due, promised the holder that he would pay the bill; if the acceptor did not; it was holden, that the drawer was bound by this promise, and could not avail himself of his ignorance of the law at the time when he made the promise.

Money due in point of honour or conscience, though a person is not compellable to pay it, yet, if paid, shall not be recovered. *Farmer v. Arundel*, 2 Bl. R. 824.

4. Where money has been paid without consideration, or on a consideration which fails, an action for money had and received will lie for the recovery of it.

The plaintiff had insured several numbers in the lottery^t,

g Jacques v. Golightly, 2 Bl. R. 1073.

of the year, insisted on being paid twenty-five guineas, and threatened to distrain if it was not paid. The defendant, in consequence of the threat paid the larger sum, and an action having been brought by the plaintiff against the defendant for another demand, the defendant insisted on setting off the five guineas which he had paid under the threat of distress, as having been paid by compulsion, and in his own wrong. But Lord Kenyon C. J. was of opinion, that this could not be deemed a payment by compulsion, as the defendant might, by a replevin, have defended himself against the distress. *Knibbs v. Hall*, 1 Esp. N. P. C. 84. cited by Lawrence J. in *Lothian v. Henderson*, 3 Bos. and Pul. 520. So where a party, sued on a claim which he knows to be unfounded, pays it; although at the time of payment he protests against it, and declares his intention to bring an action to recover back the money so paid, yet no action will lie; for he ought to have defended the action brought against him. *Brown v. M'Kinally*, 1 Esp. N. P. C. 279. Ld. Kenyon C. J. See also *Cartwright v. Rowley*, 2 Esp. N. P. C. 723. It was agreed between A. and B., that A. for a certain commission should ship a cargo of wheat of a specific quality, at a foreign port, for B. in England. The wheat upon its arrival having been found to be of an inferior quality, B. brought an action against A. for a breach of the agreement, and recovered damages. A. afterwards brought an action against B. for the commission; but it was holden, that A. could not recover; Lord Ellenborough C. J. observing, that the facts which he relied on in this action might have been given in evidence to reduce the damages when he was defendant; and that he considered the account as closed between the parties by the former verdict. *Kist v. Atkinson*, 2 Camp. N. P. C. 69.

at the office of the defendant, for which he had paid in premiums a considerable sum of money. The defendant, having refused to pay the sums insured upon some of the chances which had terminated in favour of the plaintiff, he brought an action for money had and received against the defendant, in order to recover the premiums; it was holden that the action would well lie, although it was objected, that the contract was illegal by the stat. 14 Geo. 3. c. 76. and the plaintiff *particeps criminis*; Blackstone J. observing, that on the part of the insured the contract on which he had paid his money was not criminal, but merely void, *and therefore having advanced his money without any consideration*, he was entitled to recover it back.

On the authority of the preceding case, the same point was ruled in *Jaques v. Withy*, 1 H. Bl. 65. See *Clarke v. Shee*, Cowp. 197. and post, under the sixth rule.

The deeds for securing an annuity were set aside for an informality in registering the memorial^b; it was holden, that money paid to the grantor, as the consideration of the annuity might be recovered in an action for money had and received (34).

So where a deed, a bond, and warrant of attorney (upon which judgment had been enteredⁱ) had been given for securing an annuity, and on the application of the grantor to the Court of King's Bench, the judgment was set aside, and the warrant of attorney directed to be delivered up to be cancelled, because the latter instrument was improperly described in the memorial, but no order was made as to the deed or bond, which remained uncanceled; it was holden, that the grantee might recover back the consideration in an action for money had and received, on the ground that he had contracted for one entire assurance, consisting of several securities, and that he had a right to have the assurance entire, or to have back his money, and the defendant having taken away one of the securities, the consideration for the money had failed.

It will be proper to remark here, that, in cases of this kind^k, the action for money had and received will not lie

^b *Shove v. Webb*, 1 T. R. 732. See ⁱ *Scurfield v. Gowland*, 6 East's R. 241.
stat. 17 Geo. 3. c. 36. annuity act.

^k *Stratton v. Rastall*, 2 T. R. 366.

(34) In this action the grantor may set off the payments made in respect of the annuity, and for more than six years, unless the plaintiff reply the statute of limitations. *Hicks v. Hicks*, 3 East's R. 16.

against a mere surety, who has not actually received any part of the consideration, although he has joined with the grantor in signing a receipt for it.

A lease was sold to the plaintiff by defendant as administrator^l, without any regular assignment, or other conveyance; but, at the time of sale, the defendant said, that the premises were his property, to do as he liked with, and if any thing happened, he would see the plaintiff righted. Afterwards, the defendant's letters of administration were repealed, and the plaintiff was turned out of possession by a recovery in ejectment at the suit of the new administrator: whereupon the plaintiff brought an action for money had and received, against the defendant, to recover the consideration paid for the lease; and it was holden, that it would well lie; Lord Kenyon C. J. observing, that he did not wish to disturb the rule of *caveat emptor*, adopted in *Bree v. Holbeach*^m, and in other cases, where a regular conveyance was made, to which other covenants ought not to be added; for in general the seller covenanted for his own acts, and for those of his ancestors only, in which respect the case of a mortgage differed from it, as a mortgagor covenanted, that at all events he has a good title; but here the whole passed by parol, and it proceeded on a misapprehension by both parties, that the defendant was the legal administrator of the lessee, though it turned out afterwards that he was not. As, therefore, *the money was paid under a mistake*, he thought that an action for money had and received would lie to recover it back; in the case cited (*Bree v. Holbeach*) no action at all could have been maintained (35).

^l *Cripps v. Reade*, 6 T. R. 606.

^m *Doug.* 654.

(35) So where defendant, who was in possession of the premises, of which he had been tenant under a lease from a tenant for life, then dead, sold the plaintiff the lease, pretending that it was a good lease for seven years, and shortly afterwards the plaintiff was ejected, it was holden by Lawrence J. on the authority of *Cripps v. Reade*, that the plaintiff might recover the consideration paid for the lease in an action for money had and received. *Matthews v. Hollings*, Salop Summer Assizes, 1801. *Woodfall's Landlord and Tenant*, 2d edit. p. 35.

Where money is paid, and the thing contracted for not delivered, it is money had and received to the use of the party who has paid it. *Anon.* per King C. J. *Str.* 407.

A. paid B. a sum of money for a bill of exchange on a banker,

5. If an undue advantage be taken of a person's situation, and money obtained from him by compulsion, such money may be recovered in an action for money had and received.

The plaintiff having in the month of August pawned some goods with the defendant for 20l.^a, without making any agreement for interest, went in the October following to redeem them, when the defendant, insisting on having 10l. as interest for the 20l. the plaintiff tendered^p him the 20l. and 4l. for interest, knowing the same to be more than the legal interest amounted to; the defendant still insisted on having 10l. as interest, whereupon the plaintiff, finding that he could not otherwise get his goods back, paid the defendant the sum which he demanded, and brought an action for the surplus beyond the legal interest, as money had and received to his use; the court held, that the action would well lie, for it was a payment *by compulsion* (36), and the plaintiff might have had such an immediate want of his goods that an action of trover would not have answered his purpose, and the rule *volenti non fit injuria* holds only where the party has a freedom of exercising his will.

Case for money had and received by defendant for plaintiff's use^q:—On the trial it appeared that the plaintiff had purchased of one Sansom a copyhold estate in Patingham, which was defendant's manor. The estate was let at a gross rent of 60l. *per annum*^q, landlord paying land-tax, chief rent, &c. Plaintiff applied at the next manor court to be admitted, and tendered 120l. for the fine (two years' rent), saying, that

^a Astley v. Reynolds, Str. 915.

^o See Fitzroy v. Gwillim, 1 T. R. 153.
as to the necessity of a tender of the
money really advanced.

^p Leake v. Lord Pigot, Stafford Summer Assizes, 1769, MSS.

^q It was proved by a surveyor to be
about the value of 60l. per annum.

who broke before it could be tendered, it was holden, that A. might recover back the money in an action for money had and received. Bull. N. P. 131.

(36) "For nothing having been said at the time when the money was lent, as to the quantum of interest which should be paid for the loan of it, the law must determine that matter: and the broker having possessed himself of the pawn, upon the implied contract to restore it upon the principal and legal interest being tendered, the increase of the demand beyond what he must be supposed to have contracted for, and what the law prescribes, is a fraud; and the detention of the pledge, until such demand be satisfied, is a force, which might well induce the plaintiff to pay his money, and make such payment involuntary." Arg. MSS.

no lord of a manor had a right to more than two years' value for a fine. Stevens (Lord Pigot's agent) refused to admit him, unless he paid 10l. *per cent.* on the purchase money (1650l.) 165l.; he said he durst not take the sum offered by plaintiff, nor would he suffer Mr. Jeffreys, the court-keeper, to admit plaintiff without payment of 165l. The plaintiff then paid the money demanded as a fine (165l.) in order to procure admission, but said it was too much money; and plaintiff afterwards applied to Lord Pigot himself, and to his agent in town, Mr. Partington, and offered to refer the matter of the fine to counsel. Lord Pigot said he would not return any part of the fine received, nor would he leave it to counsel. Defendant, at the trial, insisted, that 10l. *per cent.* on the purchase money was the customary fine in that manner; and by estimating the estate which was 100 acres, at 16s. 6d. per acre, made the two years' value amount to 165l. Yates J. Fines were arbitrary formerly; the estate being held at the will of the lord; but the law having now drawn the line, and copyhold estates being permanent, no more than two years' value can be taken. The lord has a right to two years' real intrinsic value of the land, and is not to be prejudiced by any collusive lease. It was necessary for the plaintiff to shew that he did not pay the fine voluntarily, but upon compulsion. The custom to take 10 *per cent.* on the purchase money, be it of ever so long a continuance, cannot bind, the law having fixed the rate in another manner (37).

6. Where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another, if money is paid upon such contracts by the one, who, from their situation and condition, are liable to be oppressed and imposed upon by the other, the party paying is not considered as standing in *pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.

The stat. 5 Geo. 2. c. 30. and the case of *Smith v. Bromley* will afford an illustration of this principle.

The stat. 5 Geo. 2. c. 30. s. 11. in order to prevent bad

r Two years' improved value, without any deduction, except for quit rents,
Grant v. Astle, Doug. 727.

(37) It was said in the course of this trial, that it was never yet settled, that a mandamus would lie to a lord of a manor to admit; but see post. tit. Mandamus.

practices upon bankrupts who have not obtained their certificates, and who, for the sake of obtaining it, will submit, and cause their friends to submit, to any terms which a hard creditor may chuse to impose, vacates all securities given by the bankrupt or any person on his behalf, as the consideration for signing his certificate.

A creditor refused to sign the certificate of a bankrupt, unless a sum of money was given him by a friend of the bankrupt. The friend gave the money, and the creditor in consequence signed the certificate. It was holden, that this money might be recovered in an action for money had and received (38).

Smith v. Bromley, Doug. 696. n. and Bull. N. P. 133. See an application of the principle of this case

by Buller J. in *Nerot v. Wallace*, 3 T. R. 25.

(38) The plaintiff first brought his action against the agent who had transacted the business for the creditor, and had in fact received the money; but as it appeared that the agent had actually paid over, or accounted for, the money to his principal, Lord Mansfield C. J. was of opinion, that the action would not lie against the agent, and the plaintiff was nonsuited. Doug. 696. n.

It is a *general* rule, that in cases of payments to a known agent, the action for money had and received ought to be brought against the principal.

A. as receiver of W., received money for quit rents due to W. and gave a receipt for them as such. (Bull. N. P. 133.) An action for money had and received having been brought against A. to try W.'s right to the quit rents, it was holden, that the action would not lie, and that it ought to have been brought against W.; the court observing, that, in cases of payment to a known agent, the action ought to be brought against the principal, unless in special cases, as under notice, or *malâ fide*. *Sadler v. Evans*, 4 Burr. 1984. In like manner it has been holden, that assumpsit for money had and received does not lie against an excise officer to recover duties received by him after the act imposing them is repealed, if the officer has paid them over to his superior. *Greenway v. Hurd*, 4 T. R. 553. In *Campbell v. Hall*, Cowp. 204. where an action for money had and received was brought against a custom-house officer to recover back some duties which had been paid to him, on the ground that the duties had not been imposed by a lawful or sufficient authority, it was stated in the special verdict that the money still remained in the hands of the defendant, *not paid over* by him to the use of the king, with the *consent* of his majesty's attorney-general, for the express purpose of trying the question as to the validity of these duties. [The student, who is desirous of further information upon the grand question agitated in *Campbell v. Hall*, is referred

In the preceding case, and in *Lowry v. Bourdieu*, Doug. 471. Lord Mansfield C. J. expressed an opinion, that the same principle applied to cases upon usurious contracts, where the debtor might recover from the creditor all beyond

to the 2nd volume of the *Canadian Freeholder*, in which the doctrine laid down by Lord Mansfield in that case is examined with great learning and ability, and censured by F. Maseres, Esq. cursitor baron of the Court of Exchequer.] If money be paid by mistake to an agent, and placed by him to the account of his principal, but *not paid over*, money had and received will lie against the agent; and the mere passing such money in account, or *making rest*, without any new credit given, fresh bills accepted, or further sum advanced for the principal, in consequence of it, is not equivalent to a payment of it over. *Buller v. Harrison*, Cowp. 566. To the general rule, that in case of payment to a known agent, the action for money had and received ought to be brought against the principal, the following authority furnishes an exception. The plaintiff being a prisoner in the Coldbath-fields prison, of which the defendant was governor, contracted with defendant for the purchase of an annuity, and paid him 750l. as a consideration for it. This annuity was afterwards set aside, and the plaintiff called on defendant to refund. The defendant paid back 715l. 17s. but insisted that he was entitled to the remainder as due to him for the rent of a room, at one guinea per week, which plaintiff had been permitted to occupy during his residence in the prison. It was objected, that, by the regulations of the prison, the gaoler had no authority to let any room upon such terms. As an answer to this, the prison books were produced, by which it appeared that the governor charged himself with the guinea per week, and accounted for it to the court; and one of the visiting magistrates of the prison was called, who said he was aware that there were such rooms, and that no objections had ever been made, and that the gaoler's book had been regularly passed at the quarter sessions. Kenyon C. J. "I think this action may be maintained—I am aware that it has been holden in the case of *Sadler v. Evans*, 4 Burr. 1984, that an action cannot be brought against an agent for money had and received to the use of his principal, but in that case there was nothing corrupt in the foundation. This agreement is one of those which the law will not allow. Besides, the county is not a corporate body, and therefore cannot be sued, except in those cases where acts of parliament have made it expressly liable. I am of opinion, therefore, that the plaintiff, notwithstanding this money has been paid over to the county, is entitled to recover." *Miller v. Aris*, B. R. Middx. Sitt. after M. T. 41. Geo. 3. MS. The same doctrine, viz. that if a person gets money into his hands illegally, he cannot discharge himself by paying it over to another, was laid down by Lord Ellenborough C. J. in *Townson v. Wilson* and others, 1 Camp. N. P. C. 396. There an action was

legal interest, in an action for money had and received, because the parties did not stand in *pari delicto*, and denied the authority of *Tomkyns v. Barnet*, Skinn. 411. and Salk. 22. where a contrary opinion had been holden at Nisi Prius by Holt C. J. according to Skinner's, and by Treby C. J. according to Salkeld's Report (39).

The same principle was recognized in the following case: An action for money had and received was brought to recover a sum of money as having been unduly obtained by the defendant from the plaintiff, under an agreement to compromise a *qui tam* action for penalties of usury, (which had been brought by the defendant against the plaintiff,) on the ground of certain usurious transactions, which had taken place between the plaintiff Williams, and one Eagleton. The sum sought to be recovered was the amount of

t *Williams v. Hedley*, 8 East, 378.

brought to recover back money paid to parish officers by a person who had been taken up under a warrant as the putative father of a bastard child. The money had been paid for the purpose of indemnifying the plaintiff against all future charges which might accrue in respect of the child. The child died before all the money was expended; it was holden, that the plaintiff was entitled to recover the surplus, beyond the expenses of the lying-in and maintenance of the child, against the officers who had received the money, although it appeared that they were gone out of office, and had paid over to their successors the sum in question.

It should be remembered also that an agent cannot defend himself on the ground of having paid over the money, unless it appear that the money was paid to the agent for the purpose of paying it to the principal (as was the case of *Sadler v. Evans*, where the money was paid to the agent of Lady Windsor for Lady Windsor's use); for where plaintiff paid a sum of money to a bailiff, who had exceeded his authority, under the terror of process, for the purpose of redeeming his goods, and not with an intent that the money should be delivered over to any one in particular; it was holden, that plaintiff might maintain an action for money had and received against the bailiff, although the bailiff had in fact paid the money over to the sheriff, and the sheriff to the Exchequer. *Snowdon v. Davis*, 1 Taunt. 359.

(39) In *Alsop v. Milton*, B. R. E. 5 G. 3. MSS. Lord Mansfield C. J. said, that *Tomkyns v. Barnet* had been denied to be law by Lord Talbot, Lord Hardwicke, and himself, for undoubted reasons; and the same case having been cited by Mr. Buller, in *Clarke v. Shee*, Cowp. 199. Lord Mansfield there said, that it had been denied a *thousand* times,

the debt which had been owing from Eagleton to Hedley and his partner; and the jury, to whom the question was left at the trial, found that the payment of this debt of Eagleton, by the plaintiff to the defendant, was obtained from the plaintiff under the terror of the above-mentioned action of usury brought by the defendant, and then depending against him, and through the means of an agreement between the parties to compromise that action; and the plaintiff thereupon recovered a verdict against the defendant for the amount of the money he had so obtained from him. Upon the authority of *Smith v. Bromley*, and *Jaques v. Golightly*, as applied to the preceding facts, and founding themselves upon the distinction taken and relied upon in those cases in favour of the party for whose benefit the provisions of the law, which had been violated, were peculiarly made, and of whose situation advantage had been unduly taken, the court were of opinion, that this action was, under the circumstances of this case, maintainable.

The cases of *Shove v. Webb*, 1 T. R. 732. and *Scurfield v. Gowland*, 6 East's R. 241. (on the annuity act) furnish a further illustration of the same principle. See also *Clarke v. Shee*, Cowp. 197^a. where a clerk of the plaintiff had received money, and negotiable notes, from the plaintiff's customers, and paid them over to the defendant as premiums for illegal insurances in the lottery, it was holden, that the plaintiff, upon identifying his property, might recover it in an action for money had and received; for the plaintiff was not *particeps criminis*, and the money had come to the defendant's hands iniquitously and illegally in breach of the statute.

One who had voluntarily offered to pay a sum of money for the use of the poor of the parish^x, in order to avoid a prosecution by a magistrate upon a charge of having instigated the escape of a prisoner in custody for a misdemeanor, which offer was consented to by the magistrate, and the money accordingly paid by the party to the master of the workhouse for the use of the poor, may countermand the application of the money before it is so applied, and may recover it back in an action for money had and received.

7. Where money has been paid by one of two parties to an illegal contract to a third person, for the use of the other party, an action for money had and received will lie against such third person to recover it.

^a See ante *Jaques v. Golightly*, 2 Bl. R. 1073. and *Jaques v. Withy*, 1 H. Bl. 65.

^x *Taylor v. Londey*, 9 East, 49.

As, where money was paid by an underwriter to a broker for the use of the assured on an illegal contract of insurance⁷, it was holden, that the assured might recover the money from the broker, on the ground, that the broker could not insist on the illegality of the contract as a defence, the obligation on him arising out of the fact of the money having been received by him to the use of the plaintiff, which created a promise in law to pay (40).

The same point was ruled in *Farmer v. Russell*, 1 Bos. & Pul. 296. in which case Buller J. said, that the knowledge and participation of the defendant in the illegal contract could not make any difference in an action for money had and received, which was not founded on the illegal contract, but on a ground totally distinct from it. Heath J. said, the distinction was, that whether the consideration was good or bad, a man might recover his own money, though not that of another person (41).

But where the money does not appear to have been actually paid into the hands of the defendant⁸, but only an account stated between him and the other party to the illegal contract, in which the defendant has given credit to such party for the money, the court will not sustain the plaintiff's demand; for by so doing they would compel the execution of an illegal contract, as if it were a legal one (42).

8. Where money is paid by one of two parties to an illegal contract *to the other* (43), in a case where both parties

⁷ *Tenant v. Elliot*, 1 Bos. and Pull. 3. ⁸ *Edgar v. Fowler*, 3 East, 222.

(40) Q. Can this decision be reconciled with *Sullivan v. Greaves*, *Park's Insurance*, 8. and ante p. 63.

(41) In *Faikney v. Reynous and Richardson*, 4 Burr. 2069, it was holden, that the plaintiff was entitled to recover upon a bond given by the defendants to secure the repayment of a sum of money paid by the plaintiff to a third person on account of the defendants, on a settlement of stock-jobbing differences. The authority of this decision, however, was doubted in *Aubert v. Maze*, 2 Bos. & Pul. 371.

(42) Lord Ellenborough C. J. observed, that in cases of illegal transactions the money may always be stopped, while it is in *transitu* to the person who is entitled to receive it.

(43) This rule is confined to the case of money paid by one of the parties *to the other*, as will appear from the 7th rule, and from the decision of *Cotton v. Thurland*, 5 T. R. 405. That was an action for money had and received, to recover back a sum of money

may be considered as *participes criminis*, an action cannot be maintained, after the contract is executed (44) to recover

which had been deposited by the plaintiff, as his share of a stake, in the defendant's hands, upon the event of a boxing match between the plaintiff and another person. The court were of opinion that the action would well lie; Lord Kenyon C. J. observing, that the action was brought, *not against one of the parties laying the wager, but a stake-holder*. "If the defendant had paid this money over to the winner, perhaps he would not have been answerable in this action, but here the money is still in the defendant's hands, and therefore I think the plaintiff may recover it from him."—Grose J. concurred in opinion with Lord Kenyon, relying on the case of *Wilkinson v. Kitchin*, Lord Raym. 89. See further on this point *Tenant v. Elliot*, 1 Bos. & Pul. 3. and *Farmer v. Russell*, 1 Bos. & Pull. 296. and ante, p. 88, establishing the same doctrine, that money received by a third person, not a party to the illegal contract, *may* be recovered.

(44) There is a sound distinction between contracts executed and executory; and, if an action is brought to rescind a contract, you must do it while the contract remains executory, per Buller J. in *Lowry v. Bourdieu*, Doug. 468. Heath J. in *Tappenden v. Randall*, 2 Bos. & Pul. 471. speaking of the preceding observation of Buller J. said, that it seemed to him that the distinction between contracts executory and executed, if taken with those modifications which Mr. J. Buller would necessarily have applied to it, was a sound distinction; that undoubtedly there might be cases where the contract might be of a nature too grossly immoral for the court to enter into any discussion of it, as where one man has paid money by way of hire to another to murder a third person; but where nothing of that kind occurred, he thought there ought to be a *locus penitentiæ*, and that a party should not be compelled against his will to adhere to the contract. Rooke J. in the same case, 2 Bos. & Pul. 471. said, that he wished it to be understood, that he fully acceded to the doctrine laid down by Mr. J. Buller respecting contracts executory and executed. Agreeably to this distinction was the case of *Walker v. Chapman*, (cited by Buller J. in *Lowry v. Bourdieu*, Doug. 471). A sum of money had been paid in order to procure a place in the customs. The place had not been procured, and the party who had paid the money having brought an action to recover it back, it was holden, that he should recover; *because the contract remained executory*. See also *Wilkinson v. Kitchin*, Lord Raym. 89. and *Pickard v. Bonner*, Peake's N. P. C. 221. The reader, however, should be apprised, that there is a case in which the circumstances were similar to those in *Walker v. Chapman*, and yet the decision was different. The case alluded to is that of *Norman v. Cole*, C. B. Middx. Sitt. after M. T. 41 G. 3. 3 Esp. N. P. C. 253. There I. S. being under sentence of death in Newgate, the plaintiff was prevailed upon to lodge a sum of money in the hands of the defendant, to be applied to the pur-

the money back again; for in *pari delicto potior est conditio defendentis* (45).

The plaintiff and defendant had laid a wager on the event of a horse race^a, prohibited by stat. 13 G. 2. c. 19. s. 2. and deposited the money in the hands of a stake-holder; the event having terminated in favour of the defendant, the money was paid over to him, with the consent of the plaintiff, who afterwards brought an action to recover it back again: but it was holden, that it would not lie, for although the law would not have enforced the payment of it, yet, having been paid, it was not against conscience for the defendant to retain it (46).

The plaintiff and defendant^b, who were lottery-office-keepers, entered into an agreement mutually to insure the number of a ticket with each other, upon condition that he, whose number should be drawn on the day next following the agreement, should receive from the other an undrawn ticket, or the value of it; the defendant's number being drawn, he chose the value of it, and received the same from

^a Howson v. Hancock, 8 T. R. 575. ^b Browning v. Morris, Cowp. 790.

pose of procuring him a pardon. The pardon not having been procured, an action was brought to recover the money; but Lord Eldon C. J. was of opinion, that the action was not maintainable; that where a person interposed his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money: the doing an act of that description should proceed from pure, and not from pecuniary motives.

(45) It must be admitted that the case of *Lacausade v. White*, 7 T. R. 535. militates against this position. There, money paid on an illegal wager was recovered back, after the event upon which the wager proceeded had terminated against the plaintiff, the court holding it more consonant to sound policy to permit money paid on an illegal consideration to be recovered back by the party paying it, than by denying the remedy to give effect to the illegal contract. But it must be observed that Le Blanc J. in *Vandyck v. Hewitt*, 1 East's R. 98. said, that the ground of the determination in *Lacausade v. White* had been very much canvassed in *Howson v. Hancock*, 8 T. R. 575. And Lawrence J. in *Williams v. Hedley*, 6 East, 382. n. appears to have considered *Lacausade v. White* as over-ruled by *Howson v. Hancock*.

(46) If A. agree to give B. money for doing an illegal act, B. cannot (although he do the act) recover the money by an action; yet if the money be paid, A. cannot recover it back again. *Webb v. Bishop*, Gloucester Lent Assizes, 1731, coram Reynolds Ch. B. Bull. N. P. 16. 132.

the plaintiff; the agreement having been continued, the plaintiff's number was drawn, but the defendant refused to give the plaintiff either an undrawn ticket or the value, whereupon the plaintiff brought an action for money had and received, to recover the sum which he paid to the defendant on his number being drawn; it was holden, that the action would not lie, because the plaintiff was not only in *pari delicto*, but also stood in the light of that species of insurer, from whom the statute meant to protect the unwary.

In like manner, where an insurance was made on a ship^c belonging to a British subject, without interest, (which is illegal by stat. 19 G. 2. c. 37.) it was holden, that the assured could not recover back the premium, after the ship had arrived safe; for the court will not interfere to assist either party, where they are in *pari delicto*.

On the same principle it was adjudged^d, that a premium paid by the plaintiff on a re-assurance of a ship, (void by stat. 19 G. 2. c. 37.) could not be recovered in an action for money had and received after the ship had been captured.

In like manner it has been holden^e, that the premium paid on an illegal assurance to cover a trading with the enemy, cannot, after the risk has been run, be recovered back again, although the underwriters could not have been compelled to make good the loss.

So where the plaintiff had insured colonial produce^f on a voyage from the West Indies for Gibraltar, and the ship, on board which the goods were laden, was lost by the perils of the seas, it was holden, that the premium could not be recovered; because colonial produce cannot legally be shipped from the British West Indies for Gibraltar, and consequently the insurance was illegal. And, as every person must be taken to be cognizant of the law, the ignorance of the assured, at the time when the insurance was made, that the insurance was illegal, will not avail him.

And it must be observed here, that this rule holds even in cases where the premium is paid by a foreigner^g, although the policy is illegal by the municipal law of this country only, and not by the law of the country to which the foreigner belongs, e. g. the stat. 12 Car. 2. c. 18. s. 1., because the rigour of our great political regulations ought not to be relaxed in favour of foreigners offending against them, and

^c Lowry v. Bourdien, Doug. 467.

^d Andree v. Fletcher, 3 T. R. 266.

^e Vandyck v. Hewitt, 1 East's R. 97.

^f Lubbock v. Potts, 7 East, 449.

^g Andree v. Fletcher, 3 T. R. 266, and Morck v. Abel, 3 Bos. & Pul. 35.

there is very little reason to presume ignorance of laws peculiarly applicable to the subjects of a foreign state.

9. Where the contract is not *malum in se*, nor prohibited by any positive law, but is of such a nature that it cannot be put in force, merely because it would be inconvenient that the merits of the question should be publicly discussed, in such case, while the contract remains executory, money paid upon it by one of the parties to the other *may* be recovered.

A. in consideration of a sum of money paid to him by B.^b, gave a bond conditioned for the payment of an annuity to B. until A. should make it appear to the satisfaction of B. that the hop duties should amount to such a sum in any one year. Before the day on which the first payment of the annuity was to have taken place, and before any payment had been made, B. applied to A., stating that he considered the bond to be illegal (47), and demanded a return of the consideration, which having been refused, B. brought an action against A. for money had and received: it was holden, that it would well lie; Rooke J. observing, that "there was nothing criminal in this contract, nor had it been executed, nor was this a case where money, which has been paid over by a stake-holder, was sought to be recovered."

10. The proprietor of cattle wrongfully distrained damage feasantⁱ, who has paid money for the purpose of having his cattle re-delivered to him, cannot recover that money in an action for money had and received: 1. because such a mode of proceeding would impose great difficulties on the defendant, by not apprising him of what he was to defend: 2. because the law has provided two specific remedies for trying questions of this kind, namely, actions of replevin and trespass (48).

But where an action for money had and received was brought against an overseer of the poor^k, to recover money

^b Tappenden v. Randall, 2 Bos. & Pul. 467. & Feltham v. Terry, Bull. N. P. 131. cited in Cowp. 419. and 1 T. R. 387.

ⁱ Lindon v. Hooper, Cowp. 414.

(47) Wagers on amount of the hop duties are neither illegal nor immoral, but the courts refuse to enforce them on account of public inconvenience. See Shirley v. Sankey, 2 Bos. & Pul. 130.

(48) In Anscomb v. Shore, 1 Camp. N. P. C. 285. it was holden, by Sir J. Mansfield, whose opinion was afterwards recognised by the court, that an action on the case would not lie for detaining cattle distrained damage feasant, after a tender of amends, such tender not having been made until after the impounding.

in his hands, which had been levied by a sale of the plaintiff's goods on a conviction, which was afterwards quashed, the court held, that the action was maintainable for the clear money produced by the sale of the goods; for the plaintiff might waive the tort, and sue for the money really due.

So if a revenue officer seize goods as forfeited^l, which are not liable to seizure, and take money of the owner to release them, the owner may recover back the money in an action for money had and received (49).

11. In cases where the contract is legal, the plaintiff cannot recover on the *general* counts in an action of assumpsit, while the contract remains open, and not rescinded by the defendant; the only remedy is on the *special* agreement.

As where the defendant sold a horse to the plaintiff with a warranty of soundness^m, and the horse proved unsound. The plaintiff tendered a return of the horse, but the defendant refused to take him back; an action for money had and received having been brought, it was holden, that it would not lie.

So where the plaintiff sold the defendant a pair of coach horsesⁿ, which he undertook to take back if the plaintiff should disapprove of them, and return them within a month. The plaintiff did return them within a month, but took another pair from the defendant, without making any new agreement. This the plaintiff also returned within a month, and received a third pair on the 23d of December, without

^l Irving v. Wilson, 4 T. R. 485.

ⁿ Weston v. Downs, Doug. 23.

^m Power v. Wells, Doug. 24 n. Cowp.

812 S. .

(49) A question arose in this case, whether the officer was entitled to a month's notice, before the action was brought, under stat. 23 G. 3. c. 70. s. 30, in order to give him an opportunity of tendering amends. The court decided that he was not; Grose J. observing, that the act was confined to actions of trespass or tort, and did not extend to an action of assumpsit, 4 T. R. 487. cited by Lord Ellenborough C. J. in Wallace v. Smith, 5 East's R. 122. But see Greenway v. Hurd, 4 T. R. 553. where an excise officer having levied duties under an act which was repealed at the time when the duties were levied, Lord Kenyon C. J. expressed an opinion, that the officer was entitled to notice, although the plaintiff sued in assumpsit; because the defendant acted as an officer of the excise when he received the money, and the plaintiff paid it to him in that character. There was, however, another point in the case, and it does not appear clearly on which the case was ultimately decided.

making any new agreement. The plaintiff disapproved of the third pair, because they were restive and would not draw, and offered to return them on the 5th of January following, but the defendant refused to take them back, and, thereupon, the plaintiff brought an action against the defendant for money had and received. It was holden, that it would not lie; for the original special contract having been continued through all the subsequent dealings, the defendant ought to have had notice by the declaration, that he was sued upon that contract.

So where a seaman had contracted with the defendant to go a voyage from A. to B.^o, and back again, with a stipulation, that he should not be entitled to his wages until the end of the voyage; it was holden, that he could not maintain a general *indebitatus assumpsit* to recover his wages *pro rata* as far as B., though he had been wrongfully dismissed at B. by the defendant.

It must be observed, however, that where the contract is rescinded by the original terms of it^p, no act remaining to be done by the defendant, the plaintiff is entitled to recover back his money. As where plaintiff had paid to the defendant ten guineas for a chaise, on condition to be returned in case the plaintiff's wife did not approve of it, paying 3s. 6d. *per diem* for the time; the plaintiff's wife not approving of the chaise, it was sent back at the expiration of three days, and left on defendant's premises without any consent on his part to receive it; the hire of 3s. 6d. *per diem* was tendered at the same time, which defendant refused as well as to return the money. An action for money had and received being brought for the ten guineas, it was holden, that it would well lie.

So where a contract is not carried into execution by reason of some negligence or default of one party^q, the other party, not having done any thing which can be considered as an execution of the contract in part, may abandon the contract and recover the money which he has paid on such contract: but this rule holds only where the contract can be rescinded *in toto*^r, so as to place both parties in the same situation they were in before. See further on this point, *Cooke v. Munstone*, 1 Bos. & Pul. N. R. 351.

12. In an action for money had and received to the plaintiff's use, the plaintiff cannot recover the money, unless it be against conscience that the defendant should retain it:

^p *Hulle v. Heightman*, 2 East's R. 145.
^q *Towers v. Barrett*, 1 T. R. 133.
^r *Giles v. Edwards*, 7 T. R. 181.

^r *Hunt v. Silk*, 5 East's R. 449. recognizing *Giles v. Edwards*.

Hence, where a forged bill of exchange was drawn upon the plaintiff^s, which he accepted and paid to an innocent indorsee for a valuable consideration, and the plaintiff on discovering the forgery brought an action against the indorsee to recover back the money as money paid by mistake, it was holden, that the action would not lie; for it was not unconscientious in the defendant to retain the money when he had once received it, upon a bill for which he had given a fair and valuable consideration, without the least privity or suspicion of any forgery, and the plaintiff ought to have satisfied himself, whether the bill was really drawn upon him by the person whose name was subscribed to it.

13. It remains only to observe, that the consideration of this action must be *money*. Hence stock cannot be recovered in an action for money had and received^u; stock being a new species of property, and not money. But where, upon a wager of ten guineas to one, the stake-holder received country bank-notes, and paid them over wrongfully to the party who had lost the wager; it was holden^v, that an action for money had and received would lie at the suit of the winner; Lord Ellenborough C. J. observing, that provincial notes were certainly not money; yet, if the defendant received them as money, and all parties agreed to treat them as such at the time, he should not be permitted to say that they were only paper and not money. As against him it was so much money received by him.

III. Of the Declaration.

Venue.—THE action of assumpsit being founded on contract is transitory (50), and consequently the venue may be laid in any county at the election of the plaintiff.

Where an action is brought in an inferior court, it must be stated in the declaration, that the *cause of action* accrued within the jurisdiction of the court. Hence in assumpsit in an inferior court, not the promise only, but the consideration^x also, on which such promise is founded, must be laid within the jurisdiction; for, the inferior court cannot hold

^s Price v. Neale, 3 Burr. 1354. 1 Bl. R. 390. S. C.

^t Nightingal v. Devisme, 3 Burr. 2589.

See also Jones v. Brinley, 1 East, 1.

^u Pickard v. Banks, 13 East, 20.

^x Ramsey v. Atkinson, 1 Lev. 50.

Whitehead v. Brown, 1 Lev. 96.

plea unless the *whole matter* is within their jurisdiction^y; consequently, if a declaration for goods sold and delivered^z, or money had and received^a, or money paid^b, merely state that the defendant promised to pay within the jurisdiction, without stating the sale and delivery of the goods, or the receipt or payment of the money, to have been within the jurisdiction, it will be error; and error, even after verdict^c, for in this case nothing shall be intended to be within the jurisdiction, that is not expressly averred to be so^d.

Day.—The day mentioned in the declaration, on which the cause of action is stated to have accrued, is not material, provided it be a day after the cause of action accrued and before action brought. If the defendant by his plea makes the time material, the plaintiff may by his replication answer to that plea, without being guilty of a departure; as where the promise was laid on the 1st of May^e, 3 Car. 1. and the defendant pleaded that the writ was first brought the 4th February, 14 Car. 2., and that he did not promise within six years before the said 4th February: replication, that he promised within six years before the said 4th of February: on motion in arrest of judgment it was holden, that the replication was not a departure from the declaration; because the time in the declaration was not material.

So where the plaintiff declared upon a promise made^f 26th March, 12 Geo. 1. the defendant pleaded, that after the promise, and before the bill filed, viz. 2d April, he tendered the money; the plaintiff replied, that after making the promise, viz. 12th February, he filed his bill: on demurrer it was objected, that plaintiff had brought his action, as appeared by his own shewing, before the cause of action accrued. But the court over-ruled the objection, observing, that as the plaintiff would not in evidence have been confined to the day in his declaration, there was not any reason he should be more confined in pleading; that in the case of a common assumpsit, the day was alleged for form only, and therefore the defendant could not confine the plaintiff to the day alleged in the declaration (51).

^y Drake v. Beare, 1 Lev. 104, 5.

^z Price v. Hill, 1 Lev. 27. Stone v. Waddington, 1 Lev. 156. Hanslip v. Coater, 2 Lev. 87. Waldo v. Cooper, 2 Wils. 16.

^a Trevor v. Wall, 1 T. R. 151.

^b Heaven v. Davenport, 11 Mod. 365. 8vo. ed.

^c Winford v. Powell, Ltd. Raym. 1310.

^d Per Atkins and Seroggs Js. 2 Mod. 197.

^e Inkersalls v. Samms, Cro. Car. 130.

^f Lee v. Rogers, 1 Lev. 110.

^g Mathews v. Spicer, Str. 806.

(51) A different rule holds in actions on promissory notes, where the day forms an essential part of the agreement. *Stafford v. Forcer*,

Manner of stating the Contract.—In the action of assumpsit the declaration must state the contract, on which the action is founded, truly and correctly; that is, either in the terms in which it was made, or according to the legal effect and operation of those terms; for a material variance between the contract alleged, and the contract proved, will be fatal^b:

As where the contract alleged was, to deliver good “*merchandisable*” wheat¹, and the proof was to deliver good “*second sort*” of wheat, the plaintiff was nonsuited for the variance:

So where the plaintiff declared upon a contract for wages upon a certain voyage from London to Africa, and thence to the West Indies; but the proof was of a contract for a voyage from London to Africa^k, and thence to the West Indies or America, and afterwards to London, &c.; the variance was holden to be fatal, the contract proved being for a different voyage than that declared on.

So where the plaintiff had agreed to purchase of the defendant 100 bags of wheat¹, 40 or 50 of which were to be delivered on one market day, and the remainder on the next market day, and the defendant had delivered 40 bags on the first market day, but had failed in delivering the remainder: in an action brought for the non-delivery of the residue, one count of the declaration stated the agreement to be for the delivery of 40 bags, and another for the delivery of 50 bags, in the first instance, but the contract was not stated in the alternative in any part of the declaration; the court held the variance fatal; for the contract ought to have been stated according to the *original* terms of it, which made it optional in the defendant to deliver 40 or 50 bags in the first instance, and not an absolute contract for the delivery of either of those quantities (52).

^b Cooke v. Munstone, 1 Bos. & Pul. N. R. 351.

^k White v. Wilson, 2 Bos. & Pul. 116.
^l Penny v. Porter, 2 East's R. 2.

ⁱ Per Holt C. J. Ld. Raym. 735.

E. 1 G. 1. cited in Cole v. Hawkins, Str. 22. and reported in 10 Mod. 311.

(52) At the close of the first argument on this case, Lord Kenyon C. J. said, that the opinion delivered by Lord Mansfield C. J. in Layton v. Pearce, Doug. 15. viz. “that where a contract is optional in a party, and he makes his election, the option is thereby determined; and the contract may then be declared on, as an absolute contract,” was extra-judicial. MSS,

So where the contract was to deliver goods within fourteen days^m, or as soon as a certain vessel arrived; the vessel arrived after the fourteen days; and on breach of the contract, by non-delivery, the plaintiff declared, in one count on a contract by the defendant to deliver within fourteen days, and in another count to deliver on the arrival of the ship; but there being no count laying the contract in the alternative, the court held the variance fatal.

Assumpsit upon a warrantyⁿ, that a horse was sound, in consideration that plaintiff would buy him at a certain price, to wit, 86l. 5s. with another count in consideration he had bought him; it appeared in evidence, that the horse was bought jointly with another at one entire price of 60 guineas. Lord Kenyon held the variance fatal.

The Consideration.—Every part of the entire consideration for any promise contained in the agreement must be stated in the declaration. But in framing a declaration on an agreement^o, which consists of several distinct parts and collateral provisions, it is not necessary to state in the declaration every part of such agreement; it is sufficient to state so much of the agreement as contains the entire consideration for the act, and the entire act which is to be done, in virtue of such consideration. The rest of the contract, which respects the liquidation of damages only, after a right to them has accrued by a breach of the contract, is matter proper to be given in evidence to the jury, but not necessary to be shewn to the court in the first instance on the face of the record (53).

In like manner, where the plaintiff states the whole consideration truly^p, and then states those parts of the defendant's promise, the breach of which he complains of, truly and correctly; that is sufficient, without stating other parts of the promise irrelevant to the breach complained of.

^m *Shipham v. Saunders*, B. R. E. 23 Geo. 3. 2 East's R. 4. n. (a).
ⁿ *Hort v. Dixon*, Middx. Sit. after M. T. 37 G. 3. B. R. MSS. See also *Symonds v. Carr*, 1 Camp. N. P. C. 361.

^o Per Lord Ellenborough C.J. delivering the judgment of the court in *Clark v. Gray*, 6 East's R. 569, 570.
^p *Miles v. Sheward*, 8 East, 7.

(53) "There are a great variety of agreements not under seal, containing detailed provisions regulating prices of labour, rates of hire, times and manner of performance, adjustments of differences, &c. which are every day declared upon in the general form of a count for work and labour." Per Lord Ellenborough C. J. S. C.

Idle and insufficient considerations do not form any essential part of the contract^q, consequently it is neither necessary to state them in the declaration, nor, if stated, to prove them. By the term "idle and insufficient considerations," must be understood such considerations as, if they stood alone unconnected with one or more sufficient considerations, would not support the promise of the defendant. They are distinguishable from illegal considerations; for, if one of the considerations, where there are two or more, is illegal, it will vitiate the whole contract, and the action cannot be supported; but an idle or insufficient consideration may be rejected; in truth, it is a nullity.

Executory considerations are traversable^r, and the performance of them must be averred with time and place. In cases, where the promise of the defendant is founded on two or more executory considerations, the performance of all must be fully and expressly averred^s; for an imperfect allegation of the performance of one only will vitiate the declaration. Where the consideration is executed, (in which case it is not traversable^t) and the promise to pay a sum certain, or to do or forbear from doing some specific act, the declaration proceeds at once from the statement of the contract to the breach, without any intermediate averment.

Breach.—The breach ought to be co-extensive with the promise, but not enlarged beyond it^u.

The promise was "to deliver a gelding in as good plight as he borrowed him^x;" the declaration averred, that he did not deliver him at all. After verdict for the plaintiff judgment was arrested, because the breach was not laid according to the promise. It will be sufficient, however, if the breach pursue the words of the promise^y.

Notice. Averment thereof.—Where the action does not lie without notice given to the defendant, an averment of such notice ought to be inserted in the declaration.

The defendant bought of the plaintiff a quantity of barley^z, and promised to pay him for it as much as he could get from any other person. The plaintiff averred in his declaration, that he afterwards sold *the same quantity* to J. S. for such a sum, but did not aver that the defendant had notice of the sum given by J. S.; for this omission the judg-

q Crisp v. Gantel, Cro. Jac. 127.
r Sexton v. Miles, Salk. 22.
s Leneret v. Rivet, Cro. Jac. 503.
t 1 Rol. Rep. 43. 401. Hob. 106.
u Cro. Jac. 116.

x Wright v. Johnson, 1 Vent. 64.
y Pilchard v. Kingston, Cro. Car. 202.
z Hall v. Hemminge, Cro. Jac. 432. 1 Ro. Abr. 463. l. 25. 3 Bulst. 65, 6, 7. S. C.

ment was arrested: and this distinction was taken^a, that, if the agreement had been that the defendant should pay as much as J. S. paid, in that case, *quia constat de personâ*, and he is indifferently named between them, the defendant at his peril should inquire of him, and the plaintiff was not bound to give notice; but where the person was altogether uncertain, there the plaintiff to entitle himself to the action ought to give notice.

See *Holmes v. Twist*, on error from B. R. in Exch. Ch. Hob. 51. to the same effect, where an averment of notice was holden necessary, on the ground that the matter rested in the privity and knowledge of the plaintiff alone: but where the conusance of the act to be done lies as well in the notice of the defendant as of the plaintiff, an averment of notice is not necessary; as where the act is to be done by a stranger^b (54): so where an act is to be done by the plaintiff to a stranger^c (55), as where the declaration stated, that, in consideration that the plaintiff had agreed to give his bond to J. S. for the debt of the defendant, the defendant promised to save him harmless, and avers that he gave the bond, and was sued, &c. An exception was taken, because it was not averred, that the plaintiff gave the defendant notice of his giving the bond; but it was over-ruled, because the defendant at his peril ought to take notice of the obligation, as in a bond to stand to an award (56).

Request.—Where a debt^d or mere duty is promised to be paid upon request, it is not necessary to make an actual request before action brought, and consequently an averment of such request in the declaration is unnecessary; for the bringing the action is a sufficient request.

In assumpsit upon a promissory note^e, payable four months

^a See *Ld. Raym.* 1127. where this case was put by *Holt C. J.* *Brice v. Carre*, 1 *Lev.* 47. S. P.

^b *Powle v. Hagger*, *Cro. Jac.* 492.

^c *Juxon v. Thornhill*, *Cro. Car.* 132.

^d *Bartlet v. Bartlet*, *Winch* 2. *Vivian v. Shipping*, *Cro. Car.* 385. *Wallis v. Scott*, 1 *Str.* 98.

^e *Frampton v. Coulson*, 1 *Wils.* 33.

(54) That is, a stranger named and agreed upon between the parties, agreeably to the distinction taken in *Cro. Jac.* 432. and ante.

(55) See the preceding note.

(56) Notice need not be given of a matter which a person is awarded to do, because he may inquire of the arbitrators. Per *Powell J.* in *Smith v. Goffe*, *Lord Raym.* 1128. See also 8 *Rep.* 92. b. S. P.

after date, it was objected in error, that the request to pay the money on the note was laid upon the same day and year that the note was dated, which was four months before it became due; to this it was answered and adjudged by the court, that there was not any occasion to lay any request; that the bringing the action was a request in law, and it appeared that the action was not brought until above a year after the note was due.

It is observable, however, that when the defendant is chargeable, upon a collateral promise to pay^f, do, or omit some act, *upon request*, and not for a mere debt or duty, an actual request ought to be made before action brought, and consequently, it ought to be averred in the declaration; and the day, year, and place, where the request was made, must be expressed, as in such case the request is parcel of the duty.

Hence it will appear, that the general averment "although often requested," is not sufficient in a case of this kind, not on account of the word "although," because that has been determined^g to be an express averment, and equivalent to the words "the plaintiff in fact says," or any other words of averment, but because time and place are omitted.

Formerly indeed the omission of time and place was considered as a defect in substance, and as good ground for general demurrer, or arresting the judgment^h, and some modern casesⁱ also appear to support the same doctrine; but in a very late case^k it was solemnly decided, that, since the statute^l for the amendment of the law, such defect can be taken advantage of by special demurrer only, and cannot be a ground for arresting the judgment even after a judgment by default; because it is an omission "of a like nature," or rather of a less material nature than those specified in the statute, such as the *prout patet per recordum*, *hpc paratus est verificare*, &c. and consequently cured by the *healing operation* of that statute.

Having exhibited to the student a general outline of the declaration in assumpsit, I shall proceed to a full explanation of some special averments which are requisite in particular cases, beginning with conditions precedent (57).

^f Birks v. Trippet, 1 Saund. 32. Sel-

man v. King, Cro. Jac. 188. Hill v.

Wade, Cro. Jac. 523. and 2 Rol. Rep.

62.

^g 3 Leon. 67.

^h Hill v. Wade, Cro. Jac. 523.

ⁱ Bach v. Owen, 5 T. R. 409.

^k Bowdell v. Parsons, B. R. M. 49 G.

3. 10 East, 359.

^l 4 Ann. c. 16. s. 1.

(57) These remarks would have followed more naturally after

Of Conditions precedent.—1st. If A. promise to do, or to abstain from doing, a certain act, in consideration of the antecedent performance of some act or promise on the part of B., the promise of A. is called a dependent promise; because B.'s right of action for a breach of such promise depends on the prior performance (or that which is equivalent to performance) of the act or promise on the part of B.; and the act or promise to be performed by B. being in the nature of a condition precedent, is usually distinguished by this appellation, because the performance (or that which is equivalent to performance) of such act or promise precedes B.'s right of action to recover damages against A. for the non-performance of his promise, and must be specially averred in the declaration.

The plaintiff declared that the defendant was possessed of 17 tod of wool^m, and that there was a conversation between them for 15 tod of the 17 tod *to be chosen by the plaintiff*; the defendant, in consideration of a sum of money to be paid on such a day, promised to deliver to the plaintiff the aforesaid 15 tod of wool, and averred that he was ready at the day to pay the defendant the money, yet the defendant had not delivered the wool; after non-assumpsit pleaded, and a verdict for the plaintiff, an exception was taken in arrest of judgment, because the plaintiff had not shewn that he had chosen 15 tod out of the 17, which is *quasi a condition precedent*, and an act to be first performed by the plaintiff before the defendant is bound to do any thing; which was assented to by the whole court.

The case of Thorpe v. Thorpe, Easter, 13 W. 3. Lord Raym. 662. Salk. 171. S. C. Rot. 253. has been considered as a leading case on this subject.

The declaration in that case statedⁿ, that the defendant held of the plaintiff certain lands by way of mortgage, that the plaintiff *agreed* to make a good and sufficient release of his equity of redemption, *in consideration whereof* the defendant promised to pay to the plaintiff a certain sum of mo-

^m Raynay v. Alexander, Yelv. 76. ⁿ See Record, 1 Lutw. 245.

the paragraph relative to executory considerations; but as they run to great length, I thought it better to postpone them, in order that the learning relative to the principal points, which ought to be attended to in framing the declaration in ordinary cases, might be reduced within as narrow a compass as possible, and presented to the reader at one view.

ney; and that the plaintiff in consideration of the said agreement, and that the plaintiff would perform his part of the agreement, promised to perform his part; and assigned for breach, that although the plaintiff had performed every thing contained in the agreement to be performed on his part, yet the defendant had not paid the sum of money agreed on; the defendant pleaded a release, of which the plaintiff cravedoyer, and then demurred.

It was insisted, on the part of the defendant, that this action was founded, not upon the making the release of the equity of redemption, but upon the *promise* to make it, and consequently the plaintiff had a right of action at the time of the promise made; and then the release of all demands, &c. coming afterwards, released it, and was a good bar to the action. To this it was answered and resolved by the court, that, if there had been a positive agreement, that the plaintiff should release the equity of redemption, and that the defendant should pay the money, the plaintiff might have maintained an action before he had made such release; but here the promise was "in consideration whereof," which made the release on the part of the plaintiff to be a condition precedent. *Holt C. J.* then entered into the distinction between positive agreements and conditions precedent, and observed, that in the case of conditions precedent, an action could not be maintained before *performance*; but in the case of positive agreements it was otherwise: he then laid down the following rules:

1. If a day be appointed for payment of the money, and the act for which the money is to be paid, cannot be done before the day appointed, then, though the agreement be to pay the money for the doing the thing, yet the action may be brought for the money before the thing done; because the agreement is positive, that the money shall be paid at the day appointed.

With respect to the reasonableness of this rule, the Chief Justice observed, that the bargain of every man ought to be performed as he understood it; and if a person will make such an agreement as to pay his money before he has the thing for which he ought to pay, and will rely upon the remedy he has to recover the said thing, he ought to perform his agreement.

2. Though a day certain be appointed for payment of the money, yet if the day is to incur *after* the time in which the consideration ought to be performed, for which the money should be paid, the performance of the consideration ought to be averred in an action brought for the money.

The chief justice then adverted to an objection which had been made to the declaration (viz.) that the plaintiff had not sufficiently averred, that he had made a release of the equity of redemption; for he ought to have shewn *how* he had done it, in order that the court might judge whether it was done according to the agreement. The chief justice admitted, that the plaintiff in his declaration ought to have shewn the time and place when and where the release was executed, and how the equity of redemption was released, and that for want of that this declaration would have been ill on demurrer; but, he added, that the defendant, by pleading over had admitted that the release of the equity of redemption was properly made, and thereby aided this defect in the declaration.

A similar exception was made in the following case: In assumpsit by the vendor against the vendee of land for not performing an agreement to purchase on certain terms, the plaintiff in his declaration alleged, that he was seized in fee of the land in question, and that the defendant agreed to purchase it *on having a good title*, and then averred, that the title to the land *was made good, perfect, and satisfactory* to the defendant: on demurrer (58), it was holden that it was not necessary for the plaintiff to set forth in the declaration all the particulars of his title, and that the averments in the present case were sufficient to enable the plaintiff to call upon the defendant for the non-execution of his part of the agreement (59).

But in a prior case^p, where the purchaser of a copyhold estate had agreed to make a deposit, and pay the remainder of the purchase money, at a certain time, on having a good title and a proper surrender made to him, an action having

• Martin v. Smith, 6 East's R. 355. p Phillips v. Fielding, 2 H. Bl. 123.

(58) It was a special demurrer to the replication; but the plea and replication being admitted to be bad, the question turned wholly on the sufficiency of the declaration.

(59) In debt for a penalty against one who had articted to purchase land, it was objected that the plaintiff had stated, in the declaration, only that he was ready and willing to make a good title, but had not shewn what title. Lord Loughborough C. J. in delivering judgment, thought that the objection was well founded, and that the plaintiff ought to have set forth his title. D. of St. Albans v. Shore, 1 H. Bl. 270. But see the remarks of Lord Ellenborough C. J. and Lawrence J. on this opinion of Lord Loughborough, 6 East's R. 561, 562.

been brought by the seller for the non-performance of the conditions on the part of the purchaser, wherein the seller alleged that he had been *always ready and willing*, and frequently offered to make a good title to the estate, and to make a proper surrender of it, on payment of the purchase money, it was holden not sufficient, but that the plaintiff ought to have averred that he actually made a good title and surrendered the estate to the purchaser, or a tender and refusal, and ought also to have shewn *what* title he had.

It has been already observed that in the cases of conditions precedent, either performance, or that which the law considers as equivalent to performance, must be specially averred in the declaration. A tender and refusal has been deemed to be equivalent to performance, and an averment to that effect is sufficient, but an averment of a tender alone without refusal is not^q.

Where the act is to be done at a particular time and place, if the party to whom the act is to be done does not attend, an actual tender becomes impossible; here then a tender in law will be sufficient; but to support this, it will be incumbent on the party who is to make the tender to shew, that he has done every thing, as far as in him lies, towards the execution of the contract, as will appear from the following cases:

In covenant (60) for not accepting stock of the Hudson's Bay Company^r, *at the company's house*, on a certain notice, the plaintiff averred that he gave the notice to the other party to come to *the Hudson's Bay House* and accept the stock, and that the plaintiff *was ready there at the day*, and offered to transfer it, but that the other party did not come to accept it, nor had paid the price agreed, &c.; upon demurrer, the declaration was holden ill; for where the party to whom the act is to be done does not come at the time and place appointed, the other ought to shew that he came at the last time of the day which the law has appointed for the doing the act; and if he came there before, he ought to shew that he continued there to the last time. And that as

^q *Lea v. Exelby*, Cro. Eliz. 888. Salk. 623. S. P. ^r *Lancashire v. Killingworth, Ltd.*
Raym. 686. Com. Rep. 116. 2 Salk.
623. and 12 Mod. 529.

(60) This case in strictness belongs to another title; but as I am not aware of any distinction between covenant and assumpsit, in respect of the doctrine here laid down, and as the reasoning of this decision was adopted in the succeeding case, I have availed myself of this opportunity of inserting it.

the stock could only be transferred when the Company's house was open, which was at stated hours of the day, the plaintiff should have averred the usage of the company in that respect, and that he came there at the proper time, and staid there until after the house was shut.

So where in assumpsit* for not accepting stock agreed to be transferred by the plaintiff at the request of the defendant, the plaintiff averred that he was ready and willing, and offered to transfer, and requested the defendant to accept the stock, which he refused; and it appeared in evidence that the contract for the sale of the stock was made on the 5th of May, 1803, a little before 12 o'clock at noon: but there was not any proof of any direct application made to the defendant to accept the stock on that day, nor was it shewn that the plaintiff had waited until the closing of the transfer books at the bank for the defendant to appear and accept the transfer; but a few days afterwards an offer was made of the stock, which was then refused: on motion for setting aside the verdict which had been given for the plaintiff, it was holden, that the allegations of the declaration were not supported by the evidence; Lord Ellenborough C. J. observing, that the plaintiff could not sustain the action without shewing a tender of the stock and refusal, or that which in law was tantamount to a tender and refusal; and that must be by shewing either *an actual* tender and refusal, which was not pretended to have been done in this case until after the 5th of May (the day on which it was evident that the contract was meant to be performed, the price being calculated accordingly); or by shewing that the plaintiff staid at the bank to the last time of that day when a tender could have been made, which was so long as the transfer books remained open, and that he was there ready to have transferred, if the defendant had been there and would have accepted the stock; which would have been a sufficient substitution of the more formal evidence of an actual tender and refusal; but here there was neither a tender in fact, nor in law.

Concurrent Acts.—2ndly. Where it is agreed that two concurrent acts shall be performed, the one by A. and the other by B. at the same time, one party cannot maintain an action against the other without averring either performance, or that which is equivalent to performance of his part of the agreement (61).

* Bordenave v. Gregory, 5 East's R. 107.

(61) "If two men agree, one that the other should have his

As where the declaration stated^t, that in consideration that the plaintiff had bought of the defendant a quantity of wheat at a certain price, to be paid by plaintiff to defendant, defendant undertook to deliver the wheat to plaintiff at S. in one month from the time of sale, and then averred, that although plaintiff always from the time of sale, for one month following and afterwards, was ready and willing to receive the corn at S., yet the defendant had not delivered the same: after verdict for the plaintiff, upon the general issue, judgment was arrested; because it was not averred, that the plaintiff had tendered to the defendant the price of the corn, or that he was ready to have paid for it on delivery; Lawrence J. observing, that "he considered this as an agreement by the defendant to deliver the corn at S. on being paid for it; that the payment of the money was to be an act *concurrent* with the delivery, and said the case was like that of *Callonel v. Briggs*, Salk. 112, 113; where, on an agreement to pay so much money six months after the bargain, the plaintiff transferring stock, Holt C. J. said, 'if either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender;' he did not say, that the not doing it should come from the defendant by way of excuse, but that the doing it must be alleged in the declaration. The tendering of the money by the plaintiff made part of the plaintiff's title to recover, and he must set forth the whole of his title."

But, *after verdict* (62), an averment, that the plaintiff was *ready and willing* to perform his part of the contract, has been holden sufficient.

As where assumpsit was brought for the non-delivery of a quantity of malt^u, which the plaintiff had bought of the

^t *Morton v. Lamb*, 7 T. R. 195. cited ^u *Rawson v. Johnson*, 1 East's R. 203. 2 N. R. 233, 240. *Smith v. Woodhouse*.

horse, the other that he will pay ten pounds for it, an action does not lie for the money, until the horse be delivered." Per Holt C. J. in *Thorpe v. Thorpe*, Salk. 171, 2.

(62) This proposition is qualified by confining it to cases after verdict, because it has not as yet been determined, that an averment of this kind would be good upon demurrer. It must, however, be admitted, that some of the judges (especially Lawrence J.) in *Rawson v. Johnson*, seem to have been of opinion, that such an averment would have been sufficient even on demurrer.

defendant at a certain price, and which defendant undertook to deliver on request; and the plaintiff averred, that although on &c. at &c. he requested the defendant to deliver the malt, *and was then and there ready and willing* to pay the defendant for the same, according to the terms of the sale, and although he was then and there *ready and willing* and offered to accept and receive the malt from the defendant, yet he did not deliver the same; after verdict for the plaintiff, it was moved, in arrest of judgment, that the declaration was defective, because it only averred a readiness and willingness in the plaintiff to pay for the malt, and did not aver an actual tender of the price agreed upon; but the court over-ruled the objection, and held the averment sufficient.

So where the declaration stated^x, that the plaintiff had bought of the defendant a quantity of oats at a certain price per quarter, which defendant had undertaken to deliver some time between Michaelmas and Lady-day; and although the defendant did, in part performance of his promise, deliver to the plaintiff a part of the oats, and although the time for the delivery of the residue was long since elapsed, and the plaintiff *was* during all that time, and still is, *ready* to receive the residue of the oats, and *pay* for the same, at the price agreed upon, yet the defendant had not delivered the same. After verdict for the plaintiff, an objection was made in arrest of judgment, because it was not averred in the declaration, that plaintiff had performed his part of the contract by tendering the price of the corn. But the objection was over-ruled by the court, and on the authority of the preceding case of Rawson v. Johnson, they held the averment sufficient.

Where it is agreed that some act shall be performed by each of two parties at the same time^y, he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part of the agreement.

Mutual Promises.—3rdly. Where there are mutual promises, and the mere promise, and not the performance thereof, is the consideration of the agreement (63), there an

^x Waterhouse v. Skinner, 2 Bos. & Pul. 447. ^y Jones v. Barkley, Doug. 684.

(63) "Whether one promise be the consideration of another, or whether the performance, and not the mere promise, be the con-

action may be maintained by either party^a, without averring performance of the agreement on his part.

As where the declaration stated, that it was agreed that a race should be run between an horse of the plaintiff and one of J. S.^a, and, in consideration that the plaintiff had agreed to deliver to the defendant a quantity of cloth, the defendant agreed to pay the plaintiff a sum of money in case J. S.'s horse should beat the plaintiff's horse, and then averred, that J. S.'s horse won the race. After verdict for the plaintiff, an exception was taken in arrest of judgment, because it was not averred in the declaration, that the cloth was delivered to the defendant; but the court over-ruled the exception, observing, that this was an action founded on mutual promises, and, therefore, it was not necessary for the plaintiff to make an averment of the delivery of the cloth; and Denison J. took this distinction, "where a plaintiff declares, that in consideration he would deliver to the defendant a piece of cloth, he, the defendant, should pay a sum of money for it, an averment of the delivery of the cloth is necessary; but if the plaintiff states an agreement, and then states that in consideration of such a promise or agreement, &c. in that case an averment is not necessary."

Having thus illustrated the nature of conditions precedent, concurrent acts, and mutual promises, it remains only to add, that there are not any technical words by which any of these considerations are constituted. The principal difficulty in the construction of agreements consists in discovering, whether the consideration be a condition precedent, a concurrent act, or a mutual promise. This, however, must be collected from the apparent intention of the parties to the agreement. The intention of the parties^b is, or is assumed to be, the governing principle of all the late determinations. When the nature of the consideration is ascertained, the rules respecting the averments before laid down invariably hold. If the reader wishes to pursue this subject further, he will find the cases relating to it fully collected, and commented upon, in Mr. Serjeant Williams's edition of Saunders, vol. i. p. 320. n. 4. vol. ii. p. 352. n. 3. See also Mr. Durnford's note in Willes's Rep. p. 157. and post, tit. Covenant. 457

^z Hob. 106.

^a Martindale v. Fisher, 1 Wils. 98.

^b Per Grose J. in Glazebrook v. Wood-

row, 8 T. R. 372. per Sir J. Mansfield in Smith v. Woodhouse, 2 Bos. & Pul. N. R. 240.

sideration, must be gathered from, and depends entirely upon, the words and nature of the agreement." Per Lawrence J. in Glazebrook v. Woodrow, 8 T. R. 373.

IV. *Of the Pleadings:*

1. *Of the General Issue, and what may be given in Evidence under it:*
2. *Accord and Satisfaction.*
3. *Infancy.*
4. *Payment.*
5. *Release.*
6. *Statutes,*
 1. *Of Limitation.*
 2. *Of Set-off.*
7. *Tender.*

I. *Of the General Issue, and what may be given in Evidence under it.*

1. *General Issue.*—THE general issue in this action is non assumpsit. If by mistake not guilty be pleaded, instead of non assumpsit, such plea will be bad on demurrer^c, but aided after verdict^d.

To a declaration in assumpsit consisting of several counts upon several promises, the defendant may plead non assumpsit generally^e.

The general issue may be pleaded, if there has not been any contract between the parties, or if the real contract be different from that on which the plaintiff has declared; e. g. if the contract was made with the plaintiff, and other persons not named in the action^f (64); or if the contract was made with the plaintiff only, and the action is brought by the plaintiff and another^g.

^c *Marshall v. Gibbs*, 2 Str. 1022. and Ca. Temp. Hard. 173. Adjudged on special demurrer.

^d *Elrington v. Deshaut*, 1 Lev. 142. *Corbyn v. Brown*, Cro. Eliz. 470.

^e *Taylor v. Willes*, Cro. Car. 219.

^f Per Raymond C. J. *Leglise v. Champante*, Str. 820.

^g *Wilsford v. Wood*, 1 Esp. N. P. C. 182.

(64) In an action on a tort a different rule holds; for there, if one only of several persons, who ought to join, bring the action, the defendant can take advantage of it by plea in abatement only, al-

Under the general issue every thing may be given in evidence which disaffirms the contract; *e. g.* the coverture of the plaintiff (65) or defendant *at the time of making the contract*^h. In like manner the defendant may give in evidence, in order to avoid the contract, gamingⁱ, infancy^k, usury^l.

If the contract be good in law, and not performed, the defendant may, under the general issue, in certain cases, give in evidence some legal excuse for the non-performance of it, as accord with satisfaction^m, a discharge before breach (66), foreign attachmentⁿ, or a release^o.

Matter of law, which amounts to the general issue, may be pleaded or given in evidence^p.

Payment, before action brought, may be given in evidence, under the general issue.

^h Adm. in *James v. Fowks*, 12 Mod. 101. and daily practice at Nisi Prius.

ⁱ Adm. by the Court in *Hussey v. Jacob*, Lord Raym. 89.

^k *Darby v. Boucher*, Salk. 279. *Season v. Gilbert*, 2 Lev. 144.

^l *Bernard v. Saul*, Str. 498. and Fort. 336. cited in Bull. N. P. 152.

^m Adm. per Holt C. J. in *Paramour*

v. Johnson, 12 Mod. 376. *Ld. Raym.* 566. S. C.

ⁿ *Welles v. Needham*, Lord Raym. 180.

^o *Miller v. Aris*, Middlesex Sittings after M. T. 41 G. 3. per Kenyon C. J. MSS. *Hawley v. Peacock*, 2 Camp. N. P. C. 558. S. P.

^p *James v. Fowks*, 12 Mod. 101.

though the defect appear on the face of the declaration, *Addison v. Overend*, 6 T. R. 766. 5 East's R. 407. except for the purpose of preventing the plaintiff from recovering any more than his share of the damages. *Nelthorpe v. Dorrington*, 2 Lev. 113. Indeed in assumpsit *against* one or more defendants, if any of the persons who ought to be *joined* are omitted, the defendant can only take advantage of it by a plea in abatement. *Rice v. Shute*, 5 Burr. 2611. *Abbot v. Smith*, 2 Bl. R. 947. *Germain v. Frederick*, B. R. T. 25 G. 3. 1 Saund. 291. c. Serjeant Williams's edit. *Dixon v. Bowman*, Mich. 1776, there cited. *Evans v. Lewis*, Exchequer, E. 1774. 1 Saund. 291. b. S. P.

(65) But if the plaintiff take husband after the suing out of the writ, and before declaration, the defendant can take advantage of the coverture by plea in abatement only. *Morgan v. Painter*, E. 35 G. 3. B. R. 6 T. R. 265.

(66) A promise, before it is broken, may be discharged by a parol agreement, but after it is broken it cannot be discharged without deed, by any new agreement, without satisfaction. Per Holt C. J. 12 Mod. 538. S. P. adm. in *Edwards v. Weeks*, 1 Mod. 262.

2. *Accord and Satisfaction.*

2. *Accord and Satisfaction.*—Accord *with satisfaction* is a good plea in bar to this action^q, because damages only are recoverable; and accord with satisfaction to one defendant is a bar to all^r.

This plea is frequently pleaded specially; but it may be given in evidence on the general issue^s (67).

An accord to make a good plea must be perfect, complete, and executed^t; for an accord executory is only substituting one cause of action for another, which might go on to any extent. Hence, a plea of accord to do several things^u, with an averment of performance of some only, and of an offer to perform the rest, is bad. So where to an assumpsit on a promissory note, the defendant pleaded an agreement^x between the defendant and plaintiff, with other creditors of the defendant, that they would accept a composition in satisfaction of their respective debts, to be paid in a reasonable time, and then averred *a tender and refusal* on the part of the plaintiff of the composition: on demurrer, the plea was holden bad.

Acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater.

To an action of *indebitatus assumpsit* for 15*l.* the defendant pleaded, that he gave the plaintiff a promissory note for 5*l.* in satisfaction, and that the plaintiff received it in satisfaction; the plaintiff put in an immaterial replication, to which the defendant demurred: after judgment for the plaintiff in C. B. it was objected on error in B. R. that the plea was ill, it appearing that the note for 5*l.* could not be a satisfaction for 15*l.*; and per Pratt C. J. we are all of opinion that the plea is not good; as the plaintiff had a good cause of action, it can only be extinguished by a satisfaction which he agrees to accept, and it is not his agreement alone that is sufficient, but it must appear to the court to be a reasonable satisfaction. If 5*l.* be (as is admitted) no satisfaction for 15*l.*, why is a simple contract to pay 5*l.* a satis-

q Dyer, 75 b.

r 9 Rep. 79 b.

s See ante.

t Peytoe's case, 9 Rep. 79 b.

u Shephard v. Lewis, T. Jones, 6.

x Heathcote v. Crookshanks, 2 T. R. 24.

y Cumber v. Wane, Str. 426.

(67) "It is indulgence to give accord with satisfaction in evidence, upon *non assumpsit*, but it has crept in, and is now settled." Per Holt C. J. 12 Mod. 377.

faction for another simple contract of three times the value? In the case of a bond, another bond has never been allowed to be pleaded in satisfaction^a, without a bettering of the plaintiff's case, as by shortening the time of payment. Judgment affirmed (68).

So where in an action of *indebitatus assumpsit* for goods sold and delivered^a, to which the defendant pleaded non assumpsit, it appeared, that the defendant, prior to his insolvency, was indebted to the plaintiff in 50*l.* for goods sold and delivered: that the defendant, in consequence of his insolvency, had compounded with all his creditors, and paid them 7*s.* in the pound, and at the time of such payment to the plaintiff, promised to pay him the residue of his debt, when he should be of ability so to do, which he was proved to have been before action brought. To meet this case, the defendant produced a receipt signed by the plaintiff for the composition of 7*s.* in the pound for his debt, which he acknowledged to be in full of all demands, and then insisted that this receipt was a discharge of the promise. A verdict having been found for defendant, on a motion for a new trial, Knight v. Cox, Bull. N. P. 153. was cited for the defendant, where the creditor having accepted a composition, and signed a release to the defendant, who in consideration thereof promised to pay him the entire debt, it was holden, that the release was a good defence to an *indebitatus assumpsit* for the original cause of action: But Lord Ellenborough C. J. said, in that case the original contract was extinguished by the release; but it could not be pretended that a receipt of part only, though expressed to be in full of all demands, must have the same operation as a release; it was impossible to contend that an acceptance of 17*l.* 10*s.* was an extinguishment of a debt of 50*l.*: He added, that there must be some

^a Manhood v. Crick, Cro. Eliz. 716. ^a Fitch v. Sutton, 5 East's R. 230.
Cro. Car. 85. and Lovelace v. Cocket,
Hob. 69, 69. S. P.

(68) Lord Ellenborough C. J. in speaking of this case of Cumber v. Wane, in Fitch v. Sutton, 5 East, 232. observed, that though it had been said by him in argument, in Heathcote v. Crookshanks, 2 T. R. 26. to have been denied to be law, and in confirmation of that, Buller J. afterwards referred to a case (stated to be that of Hardcastle v. Howard, H. 26 G. 3.) yet he (Lord Ellenborough) could not find any case of that sort; on the contrary the decision in Cumber v. Wane was directly supported by the authority of Pinnel's case, 5 Rep. 117. and it did not appear that Pinnel's case had ever been questioned.

consideration for the relinquishment of the residue,—something collateral, to shew a possibility of benefit to the party relinquishing his further claim, otherwise the agreement was *nudum pactum* (69). But the mere promise to pay the rest when of ability, put the plaintiff in no better condition than he was in before. Rule for new trial, absolute.

But the defendant may plead^b that he was the payee of a promissory note, and that he indorsed it to the plaintiff on account of the debt sued for; because, though the promissory note is not a security of a higher nature than the simple contract debt sought to be recovered in the action of *assumpsit*, yet it gives the plaintiff the advantage of holding a third person liable to him.

It will be observed, that, in the preceding case, the security was given for the whole debt; and this seems necessary to entitle the party to plead it in bar; for where a debtor had compounded with his creditors, giving them the security of a third person for payment of *part* of the stipulated dividend, it was holden, that he was not discharged upon payment of that part only, the residue continuing unpaid^c.

And further, although if creditors simply agree to accept less from their debtor than their just demand, that will not bind them; yet, if upon the faith of such an agreement a third person (also a creditor) be induced to become surety for any part of the debts, on the ground that the party will be thereby discharged, the agreement, though not under seal, will be binding; and a creditor, after the security given has been paid, cannot sue for the residue of his demand; for that would be a fraud on the surety^d.—N. It did not appear, in this case, that the plaintiff had induced any of the other creditors or the surety to sign the agreement.

3. *Infancy.*

3. *Infancy.*—The defendant may either plead specially, or give in evidence on the general issue *non assumpsit*^e,

^b *Kearlake v. Morgan*, 5 T. R. 513.

ley v. Gregory, 2 Camp. N. P. C. 383.

^c *Walker v. Seaborne*, 1 Taunt. 526.

^d *Steinman v. Magnus*, 2 Camp. N. P. C. 124. 11 East, 390. See also *Brad-*

^e *Season v. Gilbert*, 2 Lev. 144.

(69) In *Lynn v. Bruce*, 2 H. Bl. 317. it was holden, that an agreement to accept a composition in satisfaction of a debt, was not a sufficient consideration to support a promise by the debtor to pay the composition.

that he was an infant at the time of making the promise (70).

This privilege of avoiding contracts, which the law confers on such as enter into them during their minority, that is, (by the law of England) within the age of 21 years, is a personal^f privilege, the benefit of which must be claimed by the infant, and which cannot be exercised for him by any other person.

The plea of infancy ought not to be pleaded by attorney, but by guardian; for an infant cannot appoint an attorney.

In cases where the contract declared on by the plaintiff has been made with the infant for necessaries suitable to his estate and degree, the plea of infancy will not operate as a bar to the plaintiff's demand; for the law permits an infant to bind himself, either by simple contract, or single bill^g, for necessaries^h, (viz.) necessary meat, drink, apparel, proper instruction, and the like; hence it frequently becomes a question, what are necessaries.

In an action for goods sold and deliveredⁱ, it appeared that the goods in question were a livery for a servant of the defendant, who was a captain in the army, and cockades for some of the soldiers belonging to his company. The defendant relied on his infancy, insisting that the goods in question were not within the description of necessaries: the judge left it to the jury to consider whether the livery was not suitable to the degree, and the cockades a necessary expense; incidental to his situation; and the jury, being of that opinion, found a verdict for the plaintiff. On a motion for a new trial, Lord Kenyon C. J. said that the cockades could not be considered as necessaries for the defendant, and ought not to have been included in the damages: but with respect to the livery, he could not say that it was not necessary for a person in the situation of defendant to have a servant (71);

^f Per Eyre C. J. in *Keane v. Boycot*, 2 H. Bl. 515. and *Ellenborough C. J.* in *Taylor v. Croker*, 4 Esp. N. P. C. 187. ^g *Russel v. Lee*, 1 Lev. 86, 87. ^h 1 Inst. 172 a. ⁱ *Hande v. Flaney*, 8 T. R. 578.

(70) Payment of money into court will not preclude a defendant from availing himself of his infancy, because the money may have been paid into court for necessaries. Per Buller J. in *Hitchcock v. Tyson*, 2 Esp. N. P. C. 481. n.

(71) See the opinion of Haughton J. 2 Rol. R. 271. "If an infant is the owner of houses, it is necessary to have them kept in repair, and yet the contract to repair them will not bind the infant;

and if it was proper for him to have one, it was necessary that the servant should have a livery. 'The Chief Justice added, that however inclined he was in general to protect infants against improvident contracts, yet he thought this case fell within the fair liability which the law imposed on infants of being bound for necessities, which was a relative term according to their station in life (72). 'The rule for a new trial was discharged, the plaintiff's counsel agreeing to strike out the amount of the cockades.

A copyhold estate devolved on the defendant^k, when he was an infant of six years of age, whereupon he was admitted (73) and a fine duly assessed. Two years after the defendant (who had continued in possession from the time of his admission) came of age, an *indebitatus assumpsit* was brought for the fine, which the jury found to be reasonable. A question was made for the opinion of the court, whether this action would lie against the defendant, he being a minor at the time of the fine being assessed. The court were of opinion, that the action would well lie; and Yates J. said, that if assumpsit had been brought against the infant during his minority, he should have thought it maintainable: that an infant might contract for necessities, *a fortiori*, therefore, for a fine which was due on admission, without which the infant could not have received the rents and profits. But in this case it was clear beyond doubt, for the defendant had confirmed (74) the contract by his enjoyment of the estate two years after he came of age.

^k Evelyn v. Chichester, 3 Burr. 1717.

for no contracts are binding on infants, except such as concern *their person*."

(72) So in Ford v. Fothergill, 1 Esp. N. P. C. 212. Lord Kenyon C. J. said, that the question of necessities was a relative fact to be governed by the fortune or circumstances of the infant, and that proof of these circumstances lay on the plaintiff.

(73) In the report of this case in Bull. N. P. p. 154, it is stated that the defendant was admitted on coming of age.

(74) If goods, not necessities, are delivered to an infant who after full age ratifies the contract by a promise to pay, he is bound; per Raymond C. J. Southerton v. Whitlock, London Sitings, Str. 690. But see Stone v. Withipoll, Cro. Eliz. 126. where it was holden, that the simple contract of an infant, not being for necessities, was merely void, and, consequently, that a promise by his executor to pay in consideration of forbearance was *nudum pactum*. Ashhurst J. speaking upon this point of subsequent promises by infants in Cockshott v. Bennet, 2 T. R. 766, seems to confine their

Form of the Replication.—A replication in a general form, that the articles provided were necessities suitable to the estate and degree of the defendant¹, without stating how, or in what manner, they were necessities, will be sufficient to bar the plea of infancy. It is however essentially necessary, that it should appear on the face of the replication, that they ~~were~~ *were necessities for the infant* (75); for where in assumpsit against an executor for a farrier's bill, the defendant pleaded that the testator was an infant^m, the plaintiff replied, that the demand was for looking after the infant's horses, and that the work was necessary *for the horses*, on demurrer, the court held that the replication was bad; that it should have been a general replication, that the demand was for necessities for the infant, and the rest should have been left to evidence, where the circumstances of the defendant's health and fortune would be considered; and the court added, that in this case, though the work might be necessary for the horses, yet it did not appear that the horses were necessary for the infant.

It will be proper to remark here, that, on a replication to this effect, viz. that the defendant, after he came of age, confirmed the promise, if the defendant rejoins that he did not, after he came of age, confirm the promise, it is sufficient for

^l Huggins v. Wiseman, Carth. 110.
^m Clowes v. Brooks, Str. 1101. S. C. by

the name of Brooks v. Crowse, Andr. 277.

operation to *securities*. “A *security* given by an infant, which is only *voidable*, may be revived by a promise after he comes of age. In such case he is bound in equity and conscience to discharge the debt, though the law would not compel him to do so; but he may wave the privilege of infancy which the law gives him for the purpose of securing him against the impositions of designing persons; and if he choose to wave his privilege, the subsequent promise will operate upon the preceding consideration.” It is clear, that if a bond be given by an infant, during his minority, for the amount of a simple contract debt, not for necessities, the giving of the specialty will so extinguish the simple contract debt as not to leave a sufficient consideration for an express promise after full age to operate upon, and consequently an assumpsit upon the original cause of action cannot be maintained. Tapper v. Davenant, 3 Keb. 798. and Bull. N. P. 155.

(75) Necessaries for an infant's wife are necessities for him; but if provided for the marriage, he is not chargeable, though she uses them. Turner v. Trisby. Per Pratt C. J. London Sitings, E. 5 G. Str. 168. If an infant contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy, no more than if he had contracted for his own aliment or erudition. Bacon, Max. 18.

the plaintiff to prove the promise, and the defendant must prove infancy if he means to take advantage of it, because it will be presumed, that a person who contracts is of a proper age to contract until the contrary be shewn. *Borthwick v. Carruthers*, 1 T. R. 649. It must be observed, however, that a replication of a new promise, after the defendant came of age, must be supported by evidence of an express promise; payment of part of the plaintiff's demand is not in this case tantamount to evidence of a new promise to pay the remainder; as it is to take a case out of the statute of limitations. Per Kenyon C. J. in *Thrupp v. Fielder*, 2 Esp. N. P. C. p. 638.

The promise also must be voluntary, and not extorted from the party under the terror of an arrest. Per Lord Alvanley C. J. *Harmer v. Killing*, 5 Esp. N. P. C. 102.

Where infancy is given in evidence under the general issue, it is competent to the plaintiff to answer it by proof of any matter, which might have been put on the record and pleaded by way of reply to the *plea* of infancy.

Contracts entered into by infants for the maintenance of their trade are not binding on them. This rule has been established for the protection of infants against improvident acts, and that they may not incur losses by trading.

Assumpsit for goods sold^a; plea, infancy; replication, that the defendant bought the goods *pro necessario victu et apparatu et ad manutentionem familiæ suæ*: rejoinder, that the defendant kept a mercer's shop, and bought the goods in question to sell again. On demurrer, the court were of opinion, that this buying by the infant, though for the maintenance of his trade, by which he gained his living, should not bind him (76).

^a *Whittingham v. Hill*, Cro. Jac. 494.

(76) So in *Whywall v. Champion*, Str. 1083. it was ruled by Lee C. J. at the London Sittings, M. 11 Geo. 2. that tobaccoes sent to the defendant, who had set up a shop in the country, could not be recovered for as necessaries, the defendant appearing to be an infant; for the law would not suffer him to trade, which might be his undoing. So where in an action for work and labour, to which defendant pleaded infancy^{*}, it appeared that the plaintiff was a writing painter, and the defendant a painter and glazier, and the work done by the plaintiff was painting and gilding letters for the defendant's customers; Lord Kenyon C. J. said, the law would not allow an infant to trade, therefore an action could not

^{*} *Dilk v. Keighly*, 2 Esp. N. P. C. 480

So where the plaintiff declared against the defendants being merchants, according to the custom of merchants, upon a bill of exchange drawn by the defendants, one of the defendants (77) pleaded infancy. On demurrer the plea was holden good, for the infant was a trader, and the bill was drawn in the course of trade, and not for any necessities. But it has been holden lately that an infant cannot bind himself even for necessities by his acceptance of a bill of exchange.

It has been holden also, that if an infant is living under the roof of his parent, who provides every thing, which in his judgment appears to be proper, the infant cannot bind himself to a stranger even for such articles, as might under other circumstances be deemed necessities. And in one case, where an infant during his residence at a coffee-house contracted a debt with a tailor for wearing apparel, Lord Kenyon expressed an opinion that it was the duty of the tradesman, to inquire into the situation of the infant, and to learn from the parent whether the infant was in want of the articles ordered, or not, and unless the tradesman could shew that he had made such inquiry, he was not intitled to recover.

So infancy is a good bar to an action for money lent, although the infant has expended the money in the purchase of necessities.

o Williams v. W. H. and R. Harrison, Carth. 160.

p Williamson v. Watts, 1 Camp. N. P. C. 552.

q Per Gould J. Bainbridge v. Pickering, 2 Bl. R. 1225. per Bayley J. Borri-

sale v. Greville, Somerset Summ. Ass.

1810. MS. Deale v. Leave, C. B.

London Sittings after H. T. 51 G. 3.

Sir J. Mansfield C. J. S. P. MS.

r Ford v. Fothergill, Peake N. P. C. 229. 1 Esp. N. P. C. 211. S. C.

be maintained against him for work done in the course of it. I am not aware of any decision at variance with the preceding, except an anonymous case in Buller's Nisi Prius, p. 154. where it is stated that Mr. Baron Clarke in an action before him, where the defendant gave his non-age in evidence, it appearing he had been set up in a farm, and bought the sheep of the plaintiff in the way of farming, directed the jury to give a verdict for the plaintiff, and said he thought the law ought not to put it into the power of infants to impose upon the rest of the world.

(77) Where an action is brought against partners, and one of them pleads infancy, the plaintiff ought not to enter a *nolle prosequi* as to the infant, and proceed against the others, for if he does, he will be nonsuited. The proper method in this case is to discontinue the first action, and proceed *de novo* against the other partners. Jaffray v. Fairbairn and others, 5 Esp. N. P. C. 47. Per Lord Ellenborough C. J. recognising Chandler v. Parkes, 3 Esp. N. P. C. 76. per Kenyon C. J. S. P.

In debt upon a single bill, the defendant pleaded his infancy^a; plaintiff replied, that it was for necessities, viz. part for cloaths, and part money lent for his necessary support at the university. Rejoinder, that the money was lent defendant to spend at pleasure, traversing that it was lent for necessities, and issue thereupon was found for plaintiff, who had judgment in C. B. which was reversed on error in B. R.; and Parker C. J. said that an infant might buy necessities, but he could not borrow money to buy, for he might misapply the money, and therefore the law would not trust him but at the peril of the lender, who must lay it out for him, or see it laid out, and then it was his providing, and his laying out so much money in necessities for him (78).

If the action against an infant be grounded on a contract, the plaintiff cannot convert it into a tort, so as to charge the infant.

“ If one deliver goods to an infant on a contract^b, knowing him to be an infant, the infant shall not be charged for them in trover and conversion; for the law will not permit a plaintiff, by changing the form of action, to vary the lia-

^a Earle v. Peale, Salk. 386.

^b 1 Sid. 129. Manby v. Scott.

(78) In Darby v. Boucher, Salk. 279. a question was made, whether in the case of money lent to an infant, who employs it in paying for necessities, the infant was liable, and Holt C. J. was of opinion, that he was not; for it was upon the lending that the contract must arise, and after that time there could not be any contract raised to bind the infant, because after that he might waste the money; and the infant's applying it afterwards for necessities would not by matter *ex post facto* entitle the plaintiff to an action; for, as was observed by the court in Earle v. Peale, 10 Mod. 67. the law does not recognize any contracts except such as are good or bad at the time when they were made, and their nature cannot be altered by any subsequent contingency. So in Probart v. Knouth, 2 Esp. N. P. C. 472 n. where, to an action for money lent, the defence was infancy, Buller J. would not permit the plaintiff to give in evidence, that the money lent was laid out in the purchase of necessities. But it is otherwise in equity; for if one lends money to an infant to pay a debt for necessities, and in consequence thereof the infant does pay the debt, in equity the infant is liable, for there the lender of the money stands in the place of the person paid, viz. the creditor for necessities, and shall recover in equity as the other should have done at law. Per Cur. Marlow v. Pitfield, 1 P. Wms. 558. The same rule of equity holds with respect to money lent to a feme covert, and afterwards applied to her use for necessities. See post, tit. Baron and Feme, s. 4.

bility of the infant." Hence, whatever be the form of the action which is commenced, if the act done by the infant is the foundation of an assumpsit, the plea of infancy will be a good bar: as where an infant hired a mare of the plaintiff to go a journey, in the course of which the mare was strained^a. The plaintiff having declared against the infant for this injury in tort, he pleaded infancy, which on demurrer was holden a good plea; and Lord Kenyon C. J. said, that if it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants. Lord Mansfield, indeed, frequently said, that this protection was to be used as a shield and not as a sword; therefore if an infant commit slander, God forbid, that he should not be answerable for it in a court of justice. But where an infant has made an improvident contract with a person, who has been wicked enough to contract with him, such person cannot resort to a court of law to enforce such contract; and the words "wrongfully, injuriously, and maliciously," introduced into the declaration cannot vary this case(79).

A single bill^a given by an infant for the amount of necessities is binding on him, but a bond in double the amount^y is not.

So an account stated of monies due for necessities will not lie against an infant^x, the law not giving an infant credit for accurate computation, nor can he agree to any such account.

^a Jennings v. Rundall, 8 T. R. 335.

^x Russell v. Lee, 1 Lev. 86, 87.

^y Ayliff v. Archdale, Cro. Eliz. 928.

See also 1 Inst. 179. a.

^z 2 Roll. Rep. 271. and Trueman v. Hurst, 1 T. R. 40.

(79) As in the cases of contract, where the law has protected the infant against his liability, he cannot be prejudiced by the form of action in which he is sued; so in cases *ex delicto*, where he is responsible, he cannot derive any advantage from it.

In Bristow v. Eastman, 1 Esp. N. P. C. 172. Kenyon C. J. was of opinion, that money had and received would lie against the defendant, to recover money which he had embezzled, notwithstanding the infancy of the defendant, on the ground that infants were liable to actions *ex delicto*, though not *ex contractu*; and though the action for money had and received was in form an action *ex contractu*, yet in this case it was in substance an action *ex delicto*; that if trover had been brought for the property embezzled, infancy would not have been a defence; and as the object of the action for money had and received was the same, he thought the same rule of law ought to apply, and therefore that infancy ought not to be a bar.

A warrant of attorney given by an infant is absolutely void^a, and the court will not confirm it, though the infant appear to have given it (knowing that it was not valid) for the purpose of collusion; for such acts of an infant as are only voidable are allowed in equity to be confirmed, but not such as are actually void.

4. Payment.

4. *Payment*.—To an action of assumpsit the defendant may plead matter of discharge *ex post facto*, as payment before action brought.

Indebitatus assumpsit for goods sold^b: plea, payment; special demurrer, because the plea amounted to the general issue; but *per Cur.* it admits at one time a good cause of action (80) in the plaintiff, and excuses it by matter *ex post facto*, and therefore is a good plea.

Where there are several demands, the party paying may, *at the time of payment*, apply the money to which ever debt he thinks proper; but if he does not, the receiver may apply it as he pleases^c (81).

The mere production of a bill of exchange from the custody of the acceptor is not presumptive evidence of payment, unless it be shewn that the bills were once in circulation after being accepted^d. Nor is payment to be presumed from a receipt indorsed on the bill, unless it can be shewn that the receipt is in the handwriting of a person entitled to demand payment^e.

^a Saunderson v. Marr, 1 H. Bl. 75.

^b Vanhatton v. Morse, Ld. Raym. 787.

^c Bowes v. Lucas, B. R. M. 11 G. 2. Andr. 55. Goddard v. Cox, Str. 1194.

See 2 Vern. 607. S. P. per Ed. Cowp. Ch.

^d Pfiel v. Vanbatenberg, 2 Camp. N.P. C. 439.
^e S. C.

(80) "It is generally true, that a plea, which admits that there was once a cause of action, does not amount to the general issue." Per Holt C. J. in Brown v. Cornish, Ld. Raym. 217.

In pleading a plea of payment, the defendant ought to plead *actio. non.* and not *onerari non debet*, for he allows the promise to be a good promise, but avoids it by matter of discharge *ex post facto* per Holt C. J. *ibid.*

(81) The defendant owed money on two bonds, and paid money on account, but gave no directions which he would have it applied to; and upon a case reserved, it was determined, that the plaintiff had the election. Bloss v. Cutting, cited in 2 Str. 1194.

5. Release.

5. Release.—Defendant may plead a release after promise, and before action brought, specially (82), or give it in evidence^e under the general issue. The usual replication to a plea of release is *non est factum* (83).

A release, upon performance of the promise in part⁵, *quoad hoc*, will not discharge the promise for the residue.

If after the last continuance the plaintiff give the defendant a release, he may plead it in bar^g; such plea is called a plea *puis darrein continuance*: as it is pleaded sometimes at the assizes, the following form may be useful:

• **Miller v. Aris, ante. Hawley v. Peacock, 2 Camp. N. P. C. 558. S. P. f 2 Roll. Abr. 413. l. 2. adjudged. g Bull. N. P. 309.**

(82) See the form, Clerk's Assist. p. 257, 258. 2 Rich. P. B. R. p. 43. third edition.

(83) 2 Rich. Pr. B. R. p. 44.

(84) "This seems to be the proper way of pleading a collateral thing, which happens after the action brought; for by this it admits that the action was well brought, but that the plaintiff by reason of the new matter ought not to proceed further in it." *Campion v. Baker*, Lutw. 1143. "Since the case of *Evans v. Prosser*, 3 T. R. 186. it may be considered as a settled rule of pleading, that no matter of defence arising after action brought can properly be pleaded in bar of the action *generally*." Per Lord Ellenborough C. J. in *Le Bret v. Papillon*, 4 East's R. 507.

(85) The day of the return of the *venire facias*.

“ hold the assizes of our Lord the King in and for the
 “ county of G. should first come on the day of
 “ at in the said county of G.) the action afore-
 “ said is continued, to wit, on, &c. (86) at, &c. the said
 “ E. F. by his deed, dated, &c. did release,” and to shew the
 particular matter, and conclude, “ And this he is ready to
 “ verify, wherefore he prays judgment if the said E. F.
 “ ought *further* to maintain this action against him, &c.”

It is the constant experience at the assizes to put the party to verify a plea *puis darrein continuance*^b, before it is allowed; and if the party does not give some evidence of the truth of it, the judge will reject it, and go on with the cause.

The same certainty is required in this, as in other pleasⁱ.

If the jury be not taken at the day of *Nisi Prius*, a release is pleadable after the last continuance at the day in bank^k, although it be not offered at *Nisi Prius*; but otherwise it is, if the jury be taken.

6. Statutes,

1. Of Limitations.

2. Of Set-off.

1. *Statute of Limitations*.—By stat. 21 Jac. 1. c. 16. § 3. all actions upon the case (other than slander) shall be commenced and sued within six years next after the cause of such actions, and not after.

Advantage must be taken of this statute by pleading it^l, (87) although it should appear on the face of the declaration that the cause of action did not arise within six years before

^b Per Cur. in *Martin v. Wyvil*, Str. 493. ^k Doct. Pl. 300.

ⁱ Doct. Pl. 297.

^l *Puckle v. Moor*, 1 Vent. 191. *Lee v. Rogers*, 1 Lev. 110.

(86) The defendant must allege precisely the very day, time, and place. Per Cur. Yelv. 141.

(87) Different reasons are assigned for this, which seems to be an exception to the general rule, that where it is required by statute, that an action shall be commenced within a limited time, it is incumbent on the plaintiff to prove that he has complied with the terms of the statute. In an anonymous case in Salk. p. 278. Holt C. J. said, that the statute of limitations could not be given in evidence on *non assumpsit*, because that plea spoke of a time past,

the commencement of the action; and the defendant will not be permitted to give it in evidence on the general issue, *non assumpsit*.

There are two forms in which this statute is usually pleaded:

1. *That the defendant did not at any time within six years next before the commencement of the plaintiff's action, undertake or promise, &c.*

2. *That the cause or causes (if more than one) of action mentioned in the declaration, did not accrue at any time within six years next before the commencement of the plaintiff's action, &c.*

The first form is proper in actions of *indebitatus assumpsit* for goods sold and delivered, money lent, and the like, where the consideration is executed.

In an *indebitatus assumpsit*^m, on a promise to pay on demand, the defendant pleaded *non assumpsit infra sex annos*; the plaintiff demurred, on the ground that nothing was due until demand, and therefore defendant should have pleaded *non assumpsit infra sex annos* after demand, or that no demand was made within six years: But *per Cur.* If the promise were for a collateral thing, which would not create any debt until demand, it might be so; but here, it is an *indebitatus assumpsit*, which shews a debt at the time of the promise, therefore the plea is good.

The second form, viz. that the cause of action did not accrue within six years, may be adopted with safety in all cases, but is more peculiarly applicable to the cases of actions brought for breach of promises founded on collateral

^m Collins v. Benning, 12 Mod. 444.

and related to the time of making the promise, but that on *nil debet* it might; and in *Draper v. Glassop* (Ld. Raym. 153.) he expressed the same opinion.

In *Gould v. Johnson* (Ld. Raym. 838.) it was said by the court, that the statute ought to be pleaded, because an original might have been sued out within six years, and therefore the defendant should plead the statute, to the end that the plaintiff might have an opportunity to reply such matter. A different reason is assigned by Mr. Serjeant Williams, in an elaborate note on this subject in the second vol. of his edition of *Saunders*, p. 63 b. and 63 c. to which, on account of its length, I must refer the reader,

and executory considerations, in which cases the first form would be improper, as will appear from the following case:

The declaration stated, that, in consideration that the plaintiff would receive A. and B. into his house as guests, and diet them^a, the defendant promised, &c. Plea, *non assumpsit infra sex annos*, to which the plaintiff demurred: judgment for the plaintiff in the Common Pleas: on error in B. R. it was agreed by that court that the plea was ill: for this being an executory collateral promise, the defendant cannot plead *non assumpsit infra sex annos*, but should have pleaded *causa actionis non accrevit infra sex annos*; for, if the cause of action accrued within six years, it was immaterial when the promise was made.

The plea of the statute of limitations may be pleaded to an action brought on a bill of exchange, because it is not a specialty^b; and to an action brought by an attorney for his fees, because the fees are not of^c record. A promissory note payable on demand, is payable immediately; and the statute of limitations runs from the date of the note, and not from the time of demand^d.

To the plea of *non assumpsit infra sex annos* the plaintiff may tender an issue^e, that defendant did promise within six years, and this issue will be supported by evidence of an express promise (88) made by defendant within six years before action brought; for it has been holden, that this statute does not extinguish the plaintiff's right of action, but suspends the remedy only, and that this suspension is capable of being removed by a subsequent promise on the part of the defendant within the limited time.

Not only an express promise, but a mere acknowledgment of the debt, as existing, will be sufficient to support this issue.

One of the strongest cases on this subject is that of *Bryan v. Horseman*, 4 East's R. 599. where in assumpsit for wheat sold and delivered, the defendant pleaded the statute of limitations. At the trial, the plaintiff called the sheriff's officer, who proved that the defendant, on being arrested,

^a *Gould v. Johnson*, *Ld. Raym.* 932. and 2 *Salk.* 422.

^b *Renew v. Axton*, *Carth.* 3.

^c *Oliver v. Thomas*, 3 *Lev.* 367.

^d *Christie v. Fonseck*, *C. B. London* Sittings after M. T. 52 G. 3. Sir J. Mansfield C. J. M. S.

^e *Dickson v. Thomson*, 2 *Show.* 126.

(88) "Doubtless an express promise will revive the debt, though it were twenty years after." Per Holt C. J. in *Hyleing v. Hastings*, *Lord Raym.* 389.

said, "I do not consider myself as owing Mr. Bryan a farthing, it being more than six years since I contracted. *I have had the wheat I acknowledge, and I have paid some part of it, and 26l. remain due.*" (89) On the part of the defendant it was objected, that these expressions amounted to no more than what he had stated upon record in his plea, which confessed the existence of the debt, but avoided it by alleging the lapse of time. Lord Ellenborough C. J. thought, that, according to the authorities, such an acknowledgment of the existence of the debt must be deemed sufficient to take the case out of the statute, though, if the matter had been *res integra*, the point might have admitted of doubt, and accordingly by his direction a verdict passed for the plaintiff.

On a motion for a new trial, it was urged by the counsel

(89) "The slightest acknowledgment has been holden sufficient, as saying, 'Prove your debt, and I will pay you*,' 'I am ready to account, but nothing is due,' and much slighter acknowledgments than these will take a debt out of the statute." Per Lord Mansfield C. J. in *Trueman v. Fenton*, Cowp. 548. See also *Lloyd v. Maund*, 2 T. R. 762. where the same doctrine was laid down by Buller J. So, in the following case, the defendant meeting the plaintiff, said to him, "What an extravagant bill you have delivered me!" Lord Kenyon C. J. held this a sufficient acknowledgment of some money being due†. In *Clark v. Bradshaw and Cogan*, 3 Esp. N. P. C. 155, 7, where the defendant, Bradshaw, saying, "that the plaintiff had paid money for him twelve years ago, but that he had since become a bankrupt, by which he was discharged, as well as by law, from the length of time the debt accrued;" Lord Kenyon C. J. held it sufficient to take the case out of the statute. It must however amount to an acknowledgment of a debt; for where an action was brought by an executor against defendant for money had and received, it was proved that defendant said, "I acknowledge the receipt of the money, but the testatrix gave it me," Clive Baron directed the jury to find for the defendant, observing, that such an acknowledgment could not amount to a promise to pay, when he insisted that he was entitled to retain. *Owen v. Wolley*, Bull. N. P. 148. In an action against a husband for goods supplied to his wife, for her accommodation, while he occasionally visited her, a letter written by the wife acknowledging the debt within six years, is admissible evidence to take the case out of the statute of limitations. *Gregory v. Parker*, 1 Camp. N. P. C. 394.

* Per Holt C. J. in *Hayling v. Hastings*, 1 Salk. 29.

† *Lawrence v. Worrall*, Peake, N. P. C. 93.

for the defendant, that, although where there was a simple acknowledgment of the debt as then existing, and a promise to pay it might be implied from the reason and justice of the case, and the presumed intention of the party making the promise, yet that implication or presumption might be rebutted, and could not apply to an acknowledgment accompanied with a positive declaration, that the party did not consider himself bound in law to pay the debt: otherwise the plea of *non assumpsit infra sex annos*, which was an acknowledgment of the antecedent debt, might be strained into a promise. But if an acknowledgment and avoidance, when put in the form a plea on the record was a good defence, it could not upset the plea, when tendered as evidence, and that, in this case, the presumption of a new promise, which might arise from the acknowledgment, if it stood alone, was rebutted by the concomitant avoidance. The court after some hesitation, granted a rule to shew cause; but when the counsel were to have shewn cause on a subsequent day, Lord Ellenborough C. J. said, that they had looked into all the authorities, and that, whatever their opinion upon the statute might have been, had the question been new, yet, after the long train of decisions upon the subject, it was necessary to abide by the construction which had been put upon it, in conformity with which, they thought themselves bound to hold, that, what was said by the defendant, was a sufficient acknowledgment of the pre-existing debt to *create* an assumpsit, so as to take the case out of the statute.

The defendant had stated to the court^a, in an affidavit for leave to plead the statute of limitations, that "since the bill of exchange (on which the action was brought) became due (which was more than six years before) no demand for payment had been made on him," this was deemed sufficient to be left to the jury as an acknowledgment, and the jury having found a verdict for plaintiff, the court refused to grant a new trial. So where a letter was written by defendant to the plaintiff's attorney^b, on being served with a writ, couched in ambiguous terms, neither expressly denying nor admitting the debt, it was holden, that such letter ought to have been left to the jury to consider, whether it amounted to an acknowledgment of the debt, so as to take it out of the statute (90).

^a Rucker v. Hannay, B. R. T. 29 G. 3. ^t Lloyd v. Maund, 2 T. R. 760.
⁴ East's R. 604 n.

(90) See Bicknell v. Keppel, 1 Bos. & Pul. N. R. 20.

In *Whitcomb v. Whiting*, Doug. 651. an acknowledgment by one of several makers of a joint and several promissory note was holden sufficient to take it out of the statute against the others, and that such an acknowledgment might be given in evidence in a separate action against any of the others. So where one of two makers of a joint and several promissory note became a bankrupt^a, and the payee received several dividends under the commission on account of the note, and an action having been brought (within six years after the receipt of the last dividend) against the other maker for the remainder of the money due on the note, it was adjudged, that the payment of the dividends was such an acknowledgment of the debt as took the case out of the statute.

In *Yea v. Fouraker*, Bull. N. P. 149. in assumpsit on a promissory note, the defendant pleaded *non assumpsit infra sex annos*: on the trial it appeared, that the defendant was surety in the note for J. S. and that six years were elapsed since the note was given, but that, upon a demand within six years, the defendant said, "you know I had not any of the money myself, but I am willing to pay half of it." The judge was of opinion, that this promise took it out of the statute, but the jury found for the defendant: and on a motion for a new trial, the court held clearly that the opinion of the judge was right; that this promise was sufficient, and granted a new trial. According to the report of this case in 2 Burr. 1099. the court held, "that an acknowledgment of the debt *after the commencement of the action* would take it out of the statute of limitations."

Where there are mutual accounts^x (not merchants' accounts), for any item of which credit has been given within six years, this is evidence of an acknowledgment of there being an open account between the parties, and of a promise to pay the balance, so as to take the case out of the statute of limitations (91).

^a *Jackson v. Fairbank*, 2 H. Bl. 340. ^x *Catling v. Skoulding*, 6 T. R. 199.

(91) But where all the items are on one side, as in an account between a tradesman and his customer, the last item which happens to be within six years, shall not draw after it those that are of a longer standing. Per Denison J. in *Cotes v. Harris*, Bull. N. P. 149. And in this case the same learned judge held that the clause in the statute about merchants' accounts extended only to cases, where there were mutual accounts and reciprocal demands between two persons. And in *Webber v. Tivill*, 2 Saund. 124. it was holden, that this clause extended only to accounts current between merchants, and not to accounts stated between them.

In *Hyleing v. Hastings*, *Ld. Raym.* 422, "the court were of opinion, that an acknowledgment of the debt within six years of the action was good evidence of a new promise, upon *non assumpsit infra sex annos*, for a jury to find a verdict for plaintiff, but not matter upon which, if found specially, the court would give judgment for the plaintiff. And Rokeby J. compared it to the case of trover and conversion, where a demand and refusal has been holden evidence of a conversion, but not a conversion." From the language, however, of more modern decisions, it must be inferred, that the mere finding by the jury of an acknowledgment of the debt within six years of action brought will be sufficient, and that, from such acknowledgment, a promise to pay will be raised by *implication* of law.

Plaintiff declared as executor on a promise to the testator¹, defendant pleaded *non assumpsit infra sex annos*; and upon the trial it appeared, that there was a new promise made within six years, but it was made to the plaintiff and not to the testator. Per cur. he should have declared accordingly.

And in *Sarell v. Wine*, 3 East's R. 409. in the case of an action brought by an administrator on promises to the intestate, where the evidence was an acknowledgment to the administrator within six years, it was holden insufficient on the authority of the preceding case.

So where an action was brought by an executor on promises made to the testator², the defendant pleaded *non assumpsit infra sex annos*, and the plaintiff replied a subsequent promise to himself, the replication was adjudged a departure in pleading, and therefore bad.

Replication.—To the plea of the statute of limitations, the plaintiff may reply a *latitat*³ (without shewing a bill of Middlesex) or a *capias*⁴, (without shewing an original) sued out before the expiration of the limited time, with an intention to declare in the action then pending, and that such writ was returned⁵, and regularly continued⁶ to the com-

¹ *Deane v. Crane*, *Salk.* 28.

² *Hickman v. Walker*, *Willes* 27.

³ *Hollister v. Coulson*, *Str.* 550.

⁴ *Karver v. James*, *Willes* 255. *Leader v. Moxon*, 3 Bl. R. 925. S. P. per Cur.

⁵ *Karver v. James*, *Willes'* R. 253, 9.

Per 3 Judges, *Brown v. Babington*, *Lord Raym.* 393. (92).

⁶ *Rudd v. Berkenhead*, *Carth.* 144. and *Salk.* 420.

(92) In this case, Holt C. J. said, that it was a fatal fault that the plaintiff did not shew that the original writ was ever returned. And in *Atwood v. Burr*, 7 Mod. 5. he said, "if one were to continue a *latitat* for several years, he must get the first returned, upon

commencement of the action. The continuances must be stated formally in the plea, for a *taliter processum est*, before declaration, is not sufficient; and the continuances must appear on the record to be continuances of the same writ or process which was originally sued out; for where the replication alleged that a bill of Middlesex was sued out^d, which was continued to a certain time, when that proceeding stopped, and then the plaintiff sued out an attachment of privilege for the same cause of action, the replication was holden bad on demurrer; for the attachment of privilege was a writ of a different nature from a bill of Middlesex, not bearing any analogy to it; and consequently was not a continuance of the former suit.

If a *latitat* is issued out after the expiration of the six years^e, but bearing *teste* before, and the plaintiff in his replication state the *latitat* to have been sued out on the day on which it bears *teste*, the defendant, in his rejoinder, may shew the real day on which the *latitat* was sued out, and

^d Smith v. Bower, 3 T. B. 662.

^e Johnson v. Smith, 2 Burr. 950.

which return the continuances are made, though in fact he never takes out another writ; but *there must be a return of the first writ.*" The language of Holt C. J. in the preceding cases was adopted by Kenyon C. J. delivering the opinion of the court in Harris v. Woolford, 6 T. R. 618, 619.

In Kinsey v. Heyward, C. B. 1 Lutw. 256. and Lord Raym. 432. a question arose, whether an action of assumpsit in one county could be considered as a continuation of an action commenced by a writ of *clausum fregit* sued out in another county within the limited time, so as to prevent the statute of limitations attaching: Treby C. J. Powell and Nevill Justices were of opinion that it was. Blencowe J. cont.—A writ of error having been brought in B. R., the case was there determined on a different ground, viz. that admitting the assumpsit to be a continuance of the *clausum fregit*, which it was difficult to maintain, yet that writ had not been returned, nor were the continuances stated. This judgment was affirmed on error in the House of Lords. It is observable that in Brown v. Babington, Lord Raym. 882. Holt C. J. agreed in opinion with Blencowe J. "that the assumpsit could not be considered as a continuance of the action commenced by *clausum fregit*, and said, that he imagined that, after the reversal of the judgment of Kinsey v. Heyward was affirmed in parliament, this point would never have been moved again:" But Powell J. retained his former opinion, that the suing of the *clausum fregit* would avoid the statute as well as a *latitat*, alleging that a *clausum fregit* was the ancient process of the Court of Common Pleas, and very useful to the subject in saving the fine due upon the original.

aver that he did not promise within six years next before that day.

If an action be commenced in an inferior court^f, and then removed by *habeas corpus* into the King's Bench, where the plaintiff declares *de novo*, and the defendant pleads the statute of limitations, the plaintiff may reply the suit below, and shew that to have been commenced within six years of the cause of action.

And in *Story v. Atkins*, 2 Str. 719. where the declaration in the inferior court was *indebitatus assumpsit* for money due, and the declaration in the superior court was a special assumpsit on a promissory note, yet the plaintiff in his replication having averred, that the declaration in the superior court was for the same cause of action as that for which plaintiff had levied his plaint below, it was holden sufficient to bar defendant's plea of the statute of limitations.

The replication must state that the *cause of action* accrued within six years next before the suing forth of the writ; for, where in assumpsit, by an executor on promises to the testator, the defendant pleaded the statute, and the plaintiff replied, that the writ was sued out on such a day^g, and within six years before the suing out thereof, letters testamentary were granted to the plaintiff; on special demurrer, assigning for cause, that the plaintiff had not alleged positively that the *cause of action* accrued within six years before the suing forth of the writ, the replication was holden bad; the court observing, that the time of limitation must be computed from the time when the action first accrued to the testator, and not from the time of proving the will; that the proving the will did not give any new cause of action, and consequently the time, when it was done, was immaterial.

So where to assumpsit brought by the assignee of a bankrupt^h, defendant pleaded the statute of limitations; the plaintiff replied the bankruptcy and assignment, and that the cause of action arose within six years next before the assignment; on demurrer, the replication was holden bad; the court observing, that the statute would be defeated as to all simple contracts, if an assignment, at the end of five years and a half, was to set all at large again.

By stat. 21 Jac. 1. c. 16. s. 4. it is enacted, "that if judgment be given for the plaintiff and reversed by error, or the judgment be arrested, or if the defendant be out-

^f *Bevin v. Chapman*, 1 Sid. 928. and ^g *Hickman v. Walker*, Willcs 27.
^h *Matthews v. Phillips*, Salk. 424. S. P. ^h *Gray v. Mendez*, 1 Str. 556.

“lawed, and the outlawry reversed; the plaintiff, his heirs, executors, or administrators, may commence a new action or suit from time to time *within a year*, after such judgment given or outlawry reversed.”

It has been said, that within the equity of the preceding section, the courts have permitted an executor or administrator *within a year* (93) after the death of the testator or

(93) I am not aware of any case in which this point has been expressly decided, or in which it has been holden, that an executor or administrator *must* bring his action within the year. In Buller's N. P. p. 150. is the following position: “If an executor take out proper process *within a year* after the death of his testator, if the six years were not lapsed before the death of the testator, though they be lapsed within that year, yet it will be sufficient to take it out of the third section of the statute of limitations by the equity of the fourth section.” The authority cited for this position is *Cawer v. James*, probably the same case as is reported in Willes, 255. by the name of *Karver v. James*; but in Willes's Report, the position as laid down by Buller seems rather to have been admitted, than expressly determined. In like manner in *Wilcox v. Huggins*, Str. 907. and Fitzg. 170, 289. it seems to have been taken for granted. From the language, however, of Lee J. in the last-mentioned case, it may be inferred that at that time no fixed period, within which the executor or administrator might bring the action, had been established. His words are*, “In the contingency that has happened, the statute does not limit any time for the executor to bring his action; but there is a clause that provides (where a judgment is reversed after the six years) one year after the reversal for the plaintiff to bring a new action, which *may* be a direction with regard to the reasonableness of the time to be allowed an executor or administrator in the present contingency.” It is observable also, that in *Wilcox v. Huggins*, Fitzg. 171. a case (*Lethbridge v. Chapman*) was cited, where an administrator brought his action *fourteen* months after the intestate's death, and recovered; and in *Wilcox v. Huggins* (where the action was brought by the executor of an executor in right of the first testator more than four years after the death of the first executor) it was admitted by the court, that if the second executor had been retarded by suits about the will or administration, it would have altered the case, because then the neglect would have been accounted for. Perhaps the only rule that can be laid down with safety is, that the executor or administrator must bring his action within a *reasonable* time. This rule receives some sanction from the following observations of the judges in *Wilcox v. Huggins*, Fitzg. 200. Raymond C. J., “It might be too harsh a construction to say, that the debt becomes irrecoverable by an abatement of the ac-

* Fitzg. 172.

intestate, to renew a suit commenced by the testator or intestate.

To an action of *indebitatus assumpsit*¹ brought by an executor for business done by his testator, the defendant pleaded the statute of limitations. Replication, an attachment of privilege sued out returnable in eight days of the purification. Special demurrer, because the attachment was alleged to have been returnable on a general return day, instead of a day certain. the court overruled the demurrer, observing, that the writ, though informal, was sufficient to bar the statute, for if the cause had proceeded, and plaintiff had recovered, and afterwards judgment had been reversed or arrested for this irregularity, the plaintiff, by the 4th section, would have had a year's time to proceed in a new action, which shewed the spirit of the statute to be, that a suit actually begun, however informally or irregularly, was sufficient to bar the statute (94).

¹ Leadbeter v. Markland, 2 Bl. Rep. 1151.

“ tion, after the six years elapsed, by the plaintiff's death; but
 “ then the executor, to bring his case within the equity of the statute, must make a recent prosecution, as to which, the clause in
 “ the statute that provides a year after the reversal of a judgment,
 “ &c. may be a good direction.” Page Justice: “ Such a recent
 “ prosecution is to be made as will shew the party came as early as
 “ he might. If there had been a contest about the will or the
 “ right of administration, that should have been pleaded in excuse
 “ of the delay.” Probyn J. “ Nothing hath been disclosed to
 “ shew why the action was not brought sooner. If a reasonable
 “ cause had been shewn, it might bring the action within the notion
 “ of a recent prosecution, though it had been brought after the
 “ year.” Lee J. “ I think it should be in the nature of Journey's Accompts, which is a taking up and pursuing the old action
 “ in a reasonable time, which is to be discussed by the discretion of
 “ the justices, 6 Co. Spencer's case; and, by the same rule, I
 “ think what is or is not a recent prosecution, in a case of this
 “ nature, is to be determined by the discretion of the court from
 “ the circumstances of the case, but generally the year in the statute
 “ is a good direction.”

(94) So where the plaintiff had levied a plaint, and declared in an inferior court, and the cause had been removed by *habeas corpus* into the Court of King's Bench, where the plaintiff declared *de novo*; an objection having been made to the declaration in the inferior court, Raymond C. J. said, that, although the declaration in the court below should be ill, yet if the plaint were regular, it was sufficient to prevent the operation of the statute. Story v. Atkins, 2 Str. 725.

Exceptions in Case of Infancy, &c.—By the 7th section of stat. 21 Jac. 1. c. 16. “If any person, entitled to such action of trespass, detinue, trover, replevin, actions of account, debt, trespass for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, shall be, at the time of such cause of action accrued, within the age of 21 years, *feme covert*, non *compos mentis*, imprisoned, or beyond the seas, such person shall be at liberty to bring the same actions within such times as are before limited after their being of full age, discover, of sane memory, at large, and returned from beyond the seas.”

An action of assumpsit, although it is not expressly mentioned, is within the equity of the preceding clause^k.

To a plea of the statute of limitations^l, the plaintiff replied, that he was resident in foreign parts out of the kingdom of England, viz. at Glasgow in Scotland: on demurrer, this replication was holden bad, because the plaintiff must be beyond the seas (95).

If the plaintiff is a foreigner, living beyond the sea at the time when the cause of action accrues, and doth not come to England for 50 years, he still has six years after his coming to England to bring an action of assumpsit; and if he never comes to England, his right of action is not barred either against him or his executors or administrators after his death. Hence a replication^m (to a plea of the statute of limitations) that the plaintiff was beyond sea at the time when the cause of action accrued, and that he hath ever since been and still is abroad, was holden good, on demurrer.

If the plaintiff be in England when the cause of action accruesⁿ, the time of limitation begins to run, and a subsequent departure from the kingdom and going beyond the seas, will not entitle the plaintiff or his representative to maintain an action after the expiration of the limited time (96). So if there are several partners^o, and some are in

^k *Chandler v. Velett*, 2 Saund. 120. and *Rochschilt v. Leibman*, 2 Str. 936. and *Fitzgib.* 81.

^l *King v. Walker*, Bl. R. 286.

^m *Strithorst v. Grame*, 2 Bl. R. 723. ⁿ *Smith v. Hill*, 1 Wils. 134.

^o *Perry and others v. Jackson*, 4 T. R. 516.

(95) It was holden by Holt C. J. upon consideration, that Dublin, or any place in Ireland, was beyond the sea, within the meaning of this statute. *Anon.* 1 Show. 91.

(96) So when a disability is once removed, and the statute has begun to run, no subsequent disability will stop the running. See

England at the time when the cause of action accrues, and others beyond the seas, the action must be brought within six years next after the cause of action accrues, notwithstanding the absence of the partners beyond the seas.

Before the statute of Ann, hereinafter mentioned, it was holden, that the exception in the 7th section of the stat. 21 Jac. 1. c. 16. as to persons being beyond the seas, extended only to the case of plaintiffs so absent^p, and not to that of defendants; 1st. because plaintiffs only are mentioned in the statute of James; and 2dly, because the plaintiff might have filed an original, and outlawed the debtor, which would have prevented the bar of the statute. But now by stat. 4 Ann. c. 16. s. 19.^q “if any person, *against* whom
“there is any cause of action for seamen's wages, or of ac-
“tion upon the case, shall be, at the time of such cause of
“action accrued, beyond the seas, the person entitled to the
“action may bring the same against such person *after* his
“return from beyond the seas, within the time limited by
“the 21 Jac. 1. c. 16.”

To a plea of the statute it is sufficient to reply that the defendant was in the East Indies, at the time the cause of action accrued, and that plaintiff commenced his suit against the defendant within six years next after his return to this kingdom; and it is no answer to this replication to say, that the defendant remained more than six years in India after the cause of action accrued there, and within the jurisdiction of the supreme court at Calcutta in that country^r.

2. *Statutes of Set-off.*—At common law, if the plaintiff was indebted to the defendant, in as much or even more than the defendant owed to him, yet the defendant had not any method of setting off such debt in the action brought by the plaintiff for the recovery of his debt, and consequently the defendant was driven to a cross action. To obviate this inconvenience and to prevent circuitry of action, or a bill in equity, it was enacted by stat. 2 G. 2. c. 22. s. 13. (made perpetual by stat. 8 G. 2. c. 24. s. 4.) “that where there are

^p Hall v. Wybourn, Carth. 136. and
Chevely v. Bond, Carth. 226.

^q Several other actions are mentioned
in this statute.

^r Williams v. Jones, 13 East, 439.

the opinion of Lord Kenyon C. J. in Doe dem. Duroure v. Jones, 4 T. R. 311. where that learned judge speaks of the uniform construction of *all* the statutes of limitation in this respect. See also Gray v. Mendez, Str. 556. and Doe d. Griggs v. Shaen, B. R. M., 28 G. 3. MS. S. P.

“ mutual debts between the plaintiff and defendant, or if
 “ either party sue, or be sued as executor or administrator,
 “ where there are mutual debts between the testator or in-
 “ testate, and either party, one debt may be set against the
 “ other, and such matter may be given in evidence upon the
 “ general issue, or pleaded in bar, as the nature of the case
 “ shall require, so as at the time of pleading the general issue,
 “ where any such debt of the plaintiff, his testator or in-
 “ testate, is intended to be insisted on in evidence, notice
 “ shall be given of the particular sum or debt so intended
 “ to be insisted on, and upon what account it became due, or
 “ otherwise such matter shall not be allowed in evidence on
 “ such general issue.” And by stat. 8 G. 2. c. 24. s. 5. it was
 enacted and *declared*, “ that by virtue of the preceding
 “ clause, mutual debts might be set against each other,
 “ either by being pleaded in bar, or given in evidence
 “ on the general issue, in the manner therein mentioned,
 “ notwithstanding that such debts were deemed in law to
 “ be of a different nature; unless in cases where either of
 “ the said debts shall accrue by reason of a penalty con-
 “ tained in any bond or specialty; and in all cases where
 “ either the debt for which the action shall be brought, or
 “ the debt intended to be set against the same shall accrue,
 “ by reason of any such penalty, the debt intended to be
 “ set-off shall be pleaded in bar, in which plea shall be
 “ shewn how much is justly due on either side; and in case
 “ the plaintiff shall recover in any such action or suit,
 “ judgment shall be entered for no more than shall appear
 “ to be justly due to the plaintiff, after one debt being set
 “ against the other as aforesaid.”

Where an equal debt is set against the plaintiff's demand,
 the defendant may conclude his plea with a prayer of judg-
 ment, if plaintiff should maintain his action; for an equal
 debt is made a good bar by the statute (2 G. 2. c. 22.), and
 the defendant is not under any necessity of praying a dif-
 ferent judgment than if he had pleaded a release; for both
 equally destroy the plaintiff's action. Adjudged on general
 demurrer (97).

* Cook v. Dixon, E. 8 G. 2. B. R. MSS. and shortly stated in Bull. N. P. 179.

(97) Where the defendant owes the plaintiff a greater sum than
 is due from the plaintiff to him, there the defendant, in order to
 entitle himself to deduct his debt, must pray that so much may be
 deducted from the plaintiff's demand. Per Cur. in Cook v. Dixon,
 B. R. E. 8 G. 2. MSS.

Assumpsit on a promissory note for 16*l.* 10*s.*^t payable a month after date; defendant pleaded that plaintiff owed him as much money as he owed plaintiff on the note, to wit, 10*l.* 10*s.* for goods sold. On general demurrer it was objected, that the note was for 16*l.* 10*s.* payable one month after date, and, therefore, must carry interest from the end of the month: that the whole debt, pleaded by the defendant in bar, amounts but to 16*l.* 10*s.* which is a less sum than appears to be due on the note, including the interest, and consequently the plea must be ill. Lord Hardwicke C. J. "The 16*l.* 10*s.* mentioned in defendant's plea, comes under a *videlicet*, and is therefore immaterial, and not traversable; the only substantial part of the plea is, that plaintiff owes defendant for goods sold, &c. as much as defendant owed him upon the note: and if plaintiff had taken issue on this, the whole debts on both sides would have come into consideration. As it is, the addition of 16*l.* 10*s.* is superfluous, and the plaintiff by his demurrer having confessed the substantial part of the plea, judgment must be given for the defendant;" which was done accordingly.

In an action on a promissory note for 30*l.*^u the plaintiff took a verdict for the whole sum; the defendant had at the same sittings an action against the plaintiff for 11*l.* to which there was a notice to set off the note; and the court held, notwithstanding the verdict, that the note might be set off; for if, at the time of the action brought, there are mutual demands, they, by the statute, may be set off, and justice may be done by entering a remittitur on the first record as to so much.

On the authority of the preceding case, it was ruled in *Evans v. Prosser*, 3 T. R. 186, that a replication to a plea of set-off, stating, that the defendant had brought an action against the plaintiff for the same sum in which the plaintiff had paid the amount of the demand into court, was bad on general demurrer.

It being a settled rule of pleading^x, that matter of defence arising after action brought, cannot properly be pleaded in bar of the action generally, a plea of set-off, in which it is stated, "that the plaintiff, *before and at the time of the plea pleaded*, was indebted," will be bad on general demurrer, if pleaded to the action generally. *Actio. non.* goes to the

^t *Cook v. Dixon*, MSS.

^u *Baskervil v. Brown*, Bull. N. P. 180.
and 3 Burr. 1299.

^x *Evans v. Prosser*, 3 T. R. 186. recognised by Ellenborough C. J. in *Le Brett v. Papillon*, 4 East's R. 507.

commencement of the suit, and not to the time of plea pleaded (98).

As to the cases in which a set-off is allowed under the preceding statutes, it must be observed,

1. That the debts sued for, and the debts intended to be set-off, must be *mutual* and due in the same right.

Hence a joint debt cannot be set against a separate demand, nor a separate debt against a joint demand; but a debt due to the defendant, as surviving partner, may be set against a demand on defendant in his own right; and *converso*, a debt due from the plaintiff, as surviving partner, may be set against a debt due from the defendant to the plaintiff in his own right.

A defendant, sued as executor or administrator, cannot set off a debt due to defendant personally, nor can a person who is sued for his own debt set off what is due to him as executor or administrator.

The statute 2 G. 2. c. 22. s. 13. says, if either party sues or is sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other.

It will be observed, that this part of the statute is confined to cases where the party sues or is sued as executor or administrator. Hence, where an executor sues for a cause of action arising after the death of the testator, the defendant cannot set off a debt due to him from the testator:

A. having been appointed by B. his attorney to receive his rents, did, after his death, receive rent arrear in B.'s life-time; the executrix of B. brought an action against A. for the money *in her own name*, not naming herself executrix; the defendant gave notice to set off a debt due to him

y Slipper v. Stidstone, 6 T. R. 493. a Shipton v. Thompson, Willes, 103.
z French v. Andrade, 9 T. R. 582. and Bull. N. P. 180.

(98) If the debt intended to be set off accrued before action brought, the plea of set-off should state, that plaintiff was indebted to the defendant at the commencement of the action. If the debt intended to be set off accrued after action brought, and before plea pleaded, then the plea of set-off should be pleaded in the form in which pleas after the last continuance are generally pleaded, viz. that the plaintiff ought not *further* to have or maintain his action,

from the testator, which was not allowed at the trial, because the suit not being as executor, the case is not within the statute. The court of C. B. on a case made, concurred in opinion with the judge who tried the cause.

The same rule holds where the plaintiff declares as executor, if the cause of action arose after the death of the testator:

In assumpsit by the plaintiff as executor^b, for goods sold and delivered to the defendant by the plaintiff, as executor, the defendant pleaded a set-off for a debt due from the testator to the defendant. On demurrer the court held the plea bad; for to allow a set-off in this case, would be altering the course of distribution^c (99).

2. A debt barred by the statute of limitations cannot be set off. If such debt be pleaded in bar to the action, the plaintiff may reply the statute of limitations^d (100).

3. Where either of the debts accrues by reason of a penalty, the debt intended to be set off must be pleaded in bar, and the defendant in his plea must aver what is really due^e.

^b Kilvington, executor, v. Stevenson, cited by Erskine from Yates's MSS. in Teggetmeyer v. Lumley.

^c Durnford's note, Willes, 264.

^d Remington v. Stevens, Str. 1271.

^e Stat. 8 Geo. 2. c. 24. s. 5.

(99) So if the cause of action arises partly in time of testator and partly in time of executor, although the plaintiff declares as executor, yet defendant cannot set off a debt due from the testator to him:

In covenant by plaintiffs as executors*, for rent arrear in the lifetime of testator, and also since his death, the defendant at the trial before Lord Mansfield, at the sittings after Easter term, 25 Geo. 3. set off a debt due from the testator to him; and the plaintiffs were nonsuited. Erskine moved for a new trial, on the ground that this debt could not be set off in this case, and cited Shipman v. Thompson, Bull. N. P. 180, Kilvington executor v. Stevenson, from a MS. of Yates J., and Ridout and another, assignees, v. Brough, Cowp. 133. Lord Mansfield C. J. said, that he was satisfied on the point on the authority of Kilvington v. Stevenson, and made the rule absolute.

(100) If such debt be given in evidence on a notice of set off, it may be objected to at the trial. Bull. N. P. 180.

* Teggetmeyer and another, executors, v. Lumley, B. R. T. 25 G. 3. reported in Durnford's note to Hutchinson v. Sturges, Willes, 264.

In all other cases the defendant may either plead, or give a notice (101) of set-off, at his election (102).

The averment, of what is really due, in cases where the debt accrues by reason of a penalty, has been holden to be traversable^f, though laid under a *videlicet*^g.

If an agreement is entered into for the performance of covenants, with a penalty, and the covenants are broken, the *penalty* cannot be set off:

To assumpsit for money lent^h, the defendant pleaded articles of agreement with mutual covenants in a penalty for performance, and shewed a breach whereby the penalty became due, and offered to set off the same; on demurrer, the court held this plea not within the statute; Lord Mansfield C. J. observing, that it was contrary to the intention of the acts, that the penalty should be admitted to be set off,

^f Symmons v. Knox, 3 T. R. 65.
^g Grimwood v. Barrit, 6 T. R. 460.

^h Nedriff v. Hogan, 2 Burr. 1024. and Bull. N. P. 180.

(101) The same certainty is required in this notice as in a declaration.

Indebitatus assumpsit for goods sold*: defendant, in order to set off a debt due from the plaintiff to him, gave the following notice—Take notice that you are indebted to me for the use and occupation of a house, for a long time held and enjoyed, and now lately elapsed:

Lord Hardwicke C. J. These kind of notices should be almost as certain as declarations. The legislature intended them to be in the nature of cross actions, and they should be expressed with such certainty as to enable plaintiff to make a proper defence to them. Had this been a declaration for the use and occupation of a house, it would certainly have been ill: for it must have shewn the commencement and determination of the occupation.

It afterwards appeared that the debt designed to be set off was for rent reserved on lease by indenture, which not being mentioned in the notice, the chief justice said, it would be bad on that account likewise, for had this been mentioned, the plaintiff might possibly have shewn that he was evicted, or some other matter, to avoid the demand. Verdict *pro querente*. N. The preceding case was decided before the stat. 11 Geo. 2. c. 19.

(102) In country causes it is usual to plead a set-off, in order to save the trouble and expense of proving the service of notice. Tidd's Pract. 584.

* Fowler v. Jones, Middlesex Sittings after H. T. 8 Geo. 2. coram Hardwicke C. J. MSS. and Bull. N. P. 179.

when perhaps a very small sum was due for such damages as the defendant had actually sustained.

It will be proper to remark here, that a set-off reducing the plaintiff's demand under 40s. will not affect the jurisdiction of the superior court, so as to entitle the defendant to enter a suggestion on the roll, in order to obtain costs, either under stat. 3 Jac. 1. c. 15. s. 4.¹, or under stat. 23 G. 2. c. 33. s. 19.² if it appear that a sum exceeding 40s. was due at the time of action brought (103),

7. Tender.

7. Tender.—To an action of assumpsit the defendant may plead non assumpsit as to part of the plaintiff's demand, and a tender before the commencement of the plaintiff's suit as to the rest; but the defendant will not be permitted to plead non assumpsit to the whole declaration, and a tender as to part¹, because, if the general issue should be found for the defendant, it would then appear on the record, that nothing was due, although the defendant by his plea of tender had admitted something to be due.

A tender may be pleaded to a *quantum meruit*, although the demand is uncertain. *Johnson v. Lancaster*, Str. 576.

¹ *Pitts v. Carpenter*, Str. 1191. and 1 Wils. 19.

² *Gross v. Fisher*, 3 Wils. 48.

³ *Dowgall v. Bowman*, C. B. M. 11

Geo. 9. 3 Wils. 145. and 2 Bl. Rep. 723. Anon. C. B. M. 40 Geo. 3. M88. *Maclellan v. Howard*, 4 T. R. 194. S. P.

(103) The language of the two statutes is different. By the statute of James, if it appear to the judge that the debt *to be recovered* does not amount to 40s. the defendant shall have costs. By the statute of George, the defendant shall recover double costs, *if the jury, upon the trial of the cause, find the damages for the plaintiff under 40s.* unless the judge certify that, 1. the freehold, or 2. the title to the plaintiff's land, or 3. an act of bankruptcy principally came in question. It does not appear that the court in *Gross v. Fisher* adverted to this difference. N. Under the Court of Requests' Act, for Southwark, 22 G. 2. c. 47. s. 6. if the debt which was originally above 40s. be reduced below 40s. by part payment before action brought, the defendant will be permitted to enter a suggestion. *Clark v. Askew*, 8 East, 28. So under the London Court of Requests' Act, if the debt be reduced by part payment below 5l. before action brought, the defendant will be permitted to enter a suggestion. *Horn v. Hughes*, 8 East, 347.

What shall be a good Tender.—In order to sustain a plea of tender, it is not necessary in all cases to prove the actual production of money, in monies numbered; it will be sufficient to shew that the defendant was in a present condition to substantiate his offer^m, and that the plaintiff dispensed with the production of the money (104)ⁿ but there must be either an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor. To an action of assumpsit^a, the defendant pleaded a tender of 10*l.*: the evidence was, that the defendant having been employed as attorney for the plaintiff, had in that character received for his use 10*l.* in part payment, and on going from home for a time left the 10*l.* with his clerk there. Some time after the plaintiff called and demanded 16*l.* 8*s.* 11*d.* which he said he supposed Evans had received; when the clerk told him that Evans was gone from home, and had left with him 10*l.* to give to the plaintiff when he called. The plaintiff said he would not receive the 10*l.* nor any thing less than his whole demand. The clerk did not offer the 10*l.* The court were of opinion the evidence was insufficient; Lord Ellenborough C. J. observing, “it is expressly stated, that the clerk did not offer the 10*l.* He only talked about having had 10*l.* left with him to give to the plaintiff when he called, without making any offer of it, which is not a tender in law.”

If A., B., and C., have a joint demand on D., and C. has a separate demand on D.^o, and D. offer A. to pay him both the debts, which A. refuses, without objecting to the form

^m Thomas v. Evans, B. R. Trin. 48 G. 3. 10 East, 401.

ⁿ Thomas v. Evans, ub. sup.
^o Douglas v. Patrick, 3 T. R. 683.

(104) Where there is a dispute as to the amount of the demand, the plaintiff, by objecting to the quantum, may dispense with a tender of the specific sum; there should, however, be an offer to pay by producing the money, unless the plaintiff dispenses with the tender by expressly saying, that the defendant need not produce the money as he would not accept it; for, though the plaintiff might refuse the money at first, yet, if he saw it produced, he might be induced to accept it. Per Kenyon C. J. Middlesex Sitings, M. T. 42 G. 3. 4 Esp. N. P. C. 68. “I take it to be clear beyond a doubt, that if the debtor tenders a larger sum than is due, and asks change, this will be a good tender, if the creditor does not object to it *on that account*, but only demands a larger sum. There is not any occasion to produce the money, if the creditor refuses to receive it on account of more being due.” Per Kenyon C. J. London Sitings, after M. T. 32 G. 3. Peake's N. P. C. 88.

of the tender on account of his being entitled only to the joint demand; D. may plead this tender in bar of an action on the joint demand; but it ought to be pleaded as a tender to A., B., and C.

A tender of foreign money, made current by royal proclamation, is equivalent to a tender of lawful money of England^p; but a tender of bank-notes, if objected to at the time (105), is not a good legal tender^q; nor has stat. 37 Geo. 3. c. 45. (commonly called the Bank Act) made any alteration in the law in this respect (106).

A tender of money to an agent authorized to receive payment^r, is a good tender to the creditor himself.

At what Time the Tender may be made.—The tender must be made before the commencement of the suit. The lipe being drawn at the commencement of the suit, steps taken by the plaintiff, in contemplation only of an action, before tender made, will not deprive the defendant of the benefit of his tender, if such tender was made before the actual commencement of plaintiff's suit. Hence it is not any answer to a plea of tender before the exhibition of the plaintiff's bill^s, that the plaintiff had before such tender retained an attorney, and instructed him to sue out a latitat against the defendant, and that the attorney had accordingly applied

p 5 Rep. 114 b.

q Grigby v. Oakes, 2 Bos. and Pul. 526.

r Goodland v. Blcwitt, 1 Camp. N. P. C. 477.

s Briggs v. Calverly, 8 T. R. 629.

(105) "This court has never yet determined that a tender in bank-notes is *at all events* a good tender; but if they have been offered, and no objection has been made *on that account*, this court has considered it to be a good tender." Per Buller J. in Wright v. Reed, B. R. H. 30 Geo. 3. 3 T. R. 554. "It has been thought that the courts went a great way in holding a tender in bank-notes to be a good tender, if not objected to at the time." Per Chambre J. in Grigby v. Oakes, 2 Bos. and Pul. 526.

(106) By stat. 37 Geo. 3. c. 45. § 9. affidavits to hold to bail, must allege that no offer has been made to pay the sum sworn to in notes of the governor and company of the Bank of England, expressed to be payable on demand, (fractional parts of the sum of twenty shillings only excepted). But by stat. 48 G. 3. c. 18. persons applying to be discharged upon common bail, by reason of any defect in the allegation required by the preceding statute, must make proof by affidavit, that the whole sum, for which they have been holden to bail, was offered to be paid, either wholly in notes of the governor and company of the Bank of England, or partly in such notes, and partly in lawful money of this kingdom.

for such writ, before the tender, which writ was afterwards sued out.

Of the Form in which a Tender must be pleaded.—Where the money is due and payable immediately by the agreement^t, the party pleading a tender must shew that he was “always ready,” from the time when the cause of action accrued (107). Hence to an action of *indebitatus assumpsit*^u, where defendant pleaded that before the action, viz. on such a day, he tendered a certain sum of money, and that he was always afterwards ready, and then was ready: on demurrer, the plea was holden bad; for *per cur.* it is not enough that he was always ready since the tender; the money was due before, and the neglect of payment was a delay, a breach of contract, and a cause of action.

So where to an action by the indorsee of a bill of exchange^x, the defendant pleaded, that after the expiration of the time appointed for the payment of the bill and before action brought, he, the defendant, tendered the *whole* money then due upon the bill with interest, in respect of the damages sustained by the non-performance of the promise; and that he always, *from the time of making the tender*, had been, and still was, ready to pay, &c. On demurrer the plea was holden bad; Lord Ellenborough C. J. observing, that in *Giles v. Hartis*^y, it was expressly decided, that an averment of *tout temps prist* was necessary in a plea of tender, and that it was one of those land marks in pleading, which ought not to be departed from.

A plea that the defendant is ready, and has always been ready with a *profert in curia*^z, but not averring a tender, will be bad on general demurrer.

It is not necessary that a plea of tender to an action of *indebitatus assumpsit* should answer a special request laid in the declaration^a, on a day subsequent to the day on which the promise is laid; because such request is surplusage, and therefore the day, on which it is made, is wholly immaterial.

At what Time a Tender must be pleaded.—It is a general rule, that a tender cannot be pleaded after any kind of

^t *Giles v. Hartis*, Ld Raym. 254.

^u *Sweatland v. Squire*, Salk. 623.

^x *Hume v. Peploe*, 8 East, 168.

^y Ld. Raym. 254. and vid. *Wood v. Ridge*, Fort. 376.

^z *French v. Watson*, C. B. 2 Wils. 74.

^a *Giles v. Hart*, Salk. 622. and Carth. 413.

(107) But where the agreement is to pay at a certain time, tender at that time, and “always ready,” is a good plea. Per Holt C. J. in *Giles v. Hart*, Salk. 622.

imparlance^b, because the imparlance is contradictory to that part of the defendant's plea in which he alleges, that he was always ready. A tender must therefore be pleaded before imparlance of the same term with the declaration^c, unless the declaration be delivered or filed so late that the defendant is not obliged to plead to it that term; and then it may be pleaded of course within the first four days inclusive of the next term, *as of the preceding term*.

Under particular circumstances the court will give the parties, on an early application^d, leave to plead a tender after an imparlance, as where^e the writ was returnable in Easter term, and the declaration not delivered until the day before the essoign day of Trinity term, on which day it was sent by the post to Shrewsbury, where the defendant lived, so that the agent could not procure instructions to plead a tender within the first four days of Trinity term.

Where the declaration is entitled of the term generally^f, and the defendant pleads a tender, upon which he would give in evidence a tender made between the first day of the term to which the bill relates, and the day of suing out the writ, he may apply to the court to oblige the plaintiff to entitle his declaration properly (108); but this application must be supported by an affidavit of a tender made on such a day^g.

After a plea of tender, there cannot be a nonsuit^h.

Of the Replication.—To a plea of tender the plaintiff may reply a subsequent demand and refusal.

The usual form of this replication is, that, “after the making of the tender mentioned in the plea and before the commencement of the action, the plaintiff demanded the said sum (the sum tendered), but that the defendant refused to pay the same,” &c.

Issue being joined on the fact of this demand, it will be

^b *Giles v. Hart*, Salk. 622. and Carth. 413.

^c *Tidd's Prac.* 384.

^d *Browne v. Hagan*, Barnes 357. *Pitfield v. Morey*, Barnes 362.

^e *Bayley v. Houldston*, Barnes 351.

^f *Smith v. Key*, Str. 638. *Winter v. Moren*, E. 5 G. 2. B. R. MSS. 8. P.

^g *Southouse v. Allen*, T. 8 and 9 G. 2. B. R. MSS.

^h Per Heath J. in *Gutteridge v. Smith*, 2 Bl. 377. and so ruled by the same judge in *Harding v. Spicer*, Surrey Lent Ass. 1808. 1 Camp. N. P. C. 327. See *quæ*.

(108) And it seems, that if the defendant omits to do this, he will not be permitted to give the tender in evidence, although he can prove the writ sued out on a day subsequent to the tender. *Rolfe v. Nordin*, B. R. Middlesex Sittings after M. T. 42 G. 3.—Cor. m. *Le Blanc J.* 4 Esp. N. P. C. 72.

incumbent on the plaintiff to prove that he demanded the precise sum before tendered. Proof of a demand of a larger^l sum than that which was originally tendered will not support the issue.

The demand ought to be made by some person authorized to give the debtor a discharge. Hence in a case where the demand had been made by the clerk to the plaintiff's attorney^k, who had never seen the defendant before going upon this errand, Lord Ellenborough held the demand insufficient; admitting, however, that a demand by the attorney himself might have done.

If to a plea of tender the plaintiff reply a latitat^l (109), and that the tender was not made before the suing out the latitat, the defendant may rejoin, that plaintiff had not any cause of action at the time of suing it out; because the plaintiff by the replication makes the latitat the commencement of the suit; therefore it may be considered in the nature of an original writ, and defendant ought to have the same advantage of it as the plaintiff.

The same observation which was made at the conclusion of the cases relating to the plea of set-off applies here, viz. that if by the plea of tender being found for the defendant, the balance proved on the non assumpsit is under 40s.; yet, if that, added to the sum tendered, exceed 40s. the jurisdiction of the superior court will not be affected^m, and the defendant will not be permitted to enter a suggestion on the roll in order to obtain his costsⁿ.

^l Spybey v. Hide, 1 Camp. N. P. C. 181. ^l Wood v. Newton, B. R. 1 Wils. 141.
^k Coles v. Bell, Sittings after M. T. 49 ^m Heaward v. Hopkins, Doug. 44.
ⁿ Geo. 3. 1 Camp. N. P. C. 478. n. ⁿ Middx. Court of Conscience, Stat. 23 G. 3. c. 33. s. 19. (110).

(109) Denison J. doubted whether the replication of a latitat was good, because it was not material when the process issued. This was upon a supposition that the latitat was only process. 1 Wils. 148. Indeed when the suing out a latitat is not replied to the statute of limitations, or to avoid a tender or given in evidence to support a penal action, it is considered but as process, and not as the commencement of the suit. Foster v. Bonner, Cowp. 454.

(110) But see the words of the statute, by which it is enacted, "that if any action of debt or assumpsit shall be commenced in any of the king's courts at Westminster, and the defendant shall live or reside in Middlesex, and the jury upon the trial of such cause shall find the damages for the plaintiff under 40s. unless the judge shall in open court certify on the back of the record, that, 1. the freehold or title to the plaintiff's land, or, 2. an act of bankruptcy principally came in question, &c. the defendant shall recover double costs." See also Clark v. Askew, 8 East, 28.

CHAP. V.

ATTORNEY.

Of Actions brought by Attornies and Solicitors for the Recovery of their Fees. Of the Statutes 3 Jac. 1. c. 7. § 1. 2 G. 2. c. 23. § 23. relating to the Delivery of Bills by Attornies, and 12 G. 2. c. 13. § 6. Liability of Attornies for Negligence and Unskilfulness.

ATTORNIES and solicitors may maintain an action of debt^a, or of *indebitatus assumpsit* for the recovery of their fees. The latter form of action is that which is most usually adopted.

If a solicitor or agent for a third person retain an attorney, and promise him his fees, *indebitatus assumpsit* will lie against such solicitor or agent^b. But it seems doubtful, whether in this case an action of debt would lie^c.

An attorney may maintain an assumpsit for soliciting a cause in other courts, as well as in the court where he is attorney^d.

To an action of assumpsit for fees due to the plaintiff as an attorney^e, the defendant may plead the statute of limitations, viz. that he did not promise or undertake within six years next before action brought.

By stat 3 Jac. 1. c. 7. § 1. "No attorney, solicitor, or servant to any, shall be allowed from his client or master, for any fee given to any serjeant or counsellor, or for any sums of money given for copies to any officers in any court of record at Westminster, unless

^a Adm. in *Bradford v. Woodhouse*, Cro. Jac. 520. ^c Aff. *Bradford v. Woodhouse*, Cro. Jac. 520. Neg. *Sands v. Trevilian*,

^b *Ambrose and Roe*, Skin. 217, 218. Cro. Car. 194.

Adm. in *Sands v. Trevilian*, Cro. Car. 194. ^d *Thursby v. Warren*, Cro. Car. 169. ^e *Oliver v. Thomas*, Ld. Raym. 2.

“ he have a ticket subscribed with their hands and names,
 “ testifying how much hath been received or paid, and at
 “ what time; and all attornies and solicitors shall give
 “ a true bill to their masters (1), clients, or their as-
 “ signs, of all other charges concerning the suits which they
 “ have for them, subscribed with their hands and names,
 “ before they shall charge their clients with such fees or
 “ charges.”

To an action brought by an attorney to recover fees for the prosecution of an *habeas corpus*^f, to remove a plaintiff levied against defendant in an inferior court, and for defending him in that suit after it was removed into the King's Bench, the defendant pleaded this statute: on demurrer judgment was given for the plaintiff; because this statute does not extend to matters transacted in inferior courts, but to suits in the courts of Westminster Hall only.

In an action brought by an attorney against an executor for fees^g, and sums of money expended by the plaintiff in several suits for the testator of the defendant, the defendant pleaded this statute, and that the plaintiff had not given to the testator, nor to the defendant, *before the writ brought* (2), any bill of charges according to the statute; on demurrer, it was adjudged a good plea.

In *Milner v. Crowdall*, 1 Show. 338. where the same plea was pleaded, on demurrer, because defendant had not averred his plea, the objection was overruled, the plea being in the negative (3).

^f *Brickwood v. Fanshaw*, Carth. 147. ^g *Brooks v. Hague*, T. Raym. 245.

(1) *Indebitatus assumpsit* for agents' fees. It was objected on the part of the defendant that plaintiff ought to prove a bill delivered. For the plaintiff it was insisted, that agents were not within this statute; that, at the time when it was made, agents were unknown; that the attornies then came to London to solicit their causes in person. Lee C. J. was of opinion, that the case was not within the statute, but offered to save the point. Verdict for plaintiff, *Jones one, &c. v. Price*, B. R. May 19, 1748. See also *Bridges one, &c. v. Francis*, Peake's N. P. C. 1, 2. where Kenyon C. J. expressed the same opinion.

(2) This allegation seems essential, for in *Clark v. Godfrey*, Strange 633. it was settled, by the Court of Common Pleas, on great consultation, that the bill must be delivered *before action brought*, in order that the client may have an opportunity of looking it over, before he incurs further expense.

(3) In this case it was said by the court, that this statute might be given in evidence under the general issue.

By stat. 2 Geo. 2. c. 23. § 23. (made perpetual by stat. 30 Geo. 2. c. 19. § 75.) for the better regulation of attornies and solicitors, it is enacted, that “no attorney”
 “of the Courts of King’s Bench, Common Pleas, or Ex-
 “chequer, &c. nor any solicitor in Chancery, &c. shall
 “commence or maintain any action or suit for the re-
 “covery of any fees, charges, or disbursements (4), at law
 “or in equity, until the expiration of one month (5) or more,
 “after such attorney or solicitor respectively shall have de-
 “livered unto the party to be charged therewith, or left
 “for him, at his dwelling house (6), or last place of abode,
 “a bill of such fees, charges, and disbursements, written
 “in a common legible hand, and in the English tongue, ex-
 “cept law terms and names of writs, and in words at length
 “(7), except times and sums, which bill shall be subscribed
 “with the proper hand of such attorney or solicitor; and
 “upon application of the party chargeable by such bill, or
 “of any other person in that behalf authorised, unto the
 “Lord Chancellor, or the Master of the Rolls, or unto any
 “of the courts aforesaid, or unto a judge or baron of any
 “of the said courts, respectively, in which the business
 “contained in such bill, or the greatest part thereof in
 “amount or value shall have been transacted, they may re-
 “fer the bill, &c. to be taxed (although no action be de-
 “pending in such court touching the same).”

The foregoing provisions, being beneficial to the subject, have received a liberal construction^a; hence, where part of the charges of an attorney’s bill was for drawing an affidavit, and for attendance on the party at the swearing, it was holden, that they were charges for proceedings in court, because

^a Winter one, &c. v. Payne, 6 T.R. 645.

(4) Charges for conveyancing are not within this statute. See post, Hill v. Humphreys, p. 152. and 2 Bos. and Pul. 345. See also Buller’s N. P. 145. Money paid by an attorney for costs which his client is adjudged to pay, is a disbursement within this statute. Crowder, Lavie, and Co. v. Shee, 1 Camp. N. P. C. 437.

(5) The term “month” here means a lunar month. Hurd v. Leach, 5 Esp. N. P. C. 163. Ellenborough C. J.

(6) Leaving at the counting-house is not sufficient. 2 Bos. and Pul. 343.

(7) By statute 12 G. 2. c. 13. § 5. every attorney, clerk in court, and solicitor, may write his bill of fees, charges, and disbursements, with such abbreviations as are now commonly used in the English language.

the oath must either be administered by the court, or by some authority delegated by the court; and that an action could not be maintained for the recovery of such charges because a bill had not been delivered a month before the action was brought. So where an action was brought for the amount of a bill for business done at the quarter sessions^l, upon a prosecution for an assault, carried on by defendant, it was holden, that the action could not be maintained because there was not any signature to the bill which had been delivered (8).

The bill must be *left* with the party charged^k, for in a case where the plaintiff had *delivered* his bill to the defendant in due time, who acknowledged the debt, and said that he would pay it, but that he did not know what to do with the bill, upon which the plaintiff took it back again, it was holden, that the bill ought to have been left with the defendant; for the intention of the statute was, that the client should have due time to examine the charges made by the attorney, and take advice upon them, if necessary.

In like manner it has been holden^l, that although an attorney shews his client a copy of his bill, explaining the different charges to him, in the reasonableness of which the client acquiesces, the attorney is notwithstanding bound to leave a copy of the bill with him.

Where several are jointly liable to an attorney for business done^m, the delivery of a copy of a bill to one of them from whom the attorney has received his instructionsⁿ, is sufficient.

^l Clarke v. Donovan, 5 T. R. 694.

^k Brooks v. Mason, 1 H. Bl. 290.

^l Crowder v. Shee, 1 Camp. N. P. C. 487.

^m Per Ellenborough C. J. 1 Camp. N. P. C. 438.

ⁿ Finchett v. How, 2 Camp. N. P. C. 277.

(8) Buller J. had ruled otherwise in Stephenson v. Taylor and another, York Summer Assizes, 1786, on the ground that the statute was confined to business done in a court of record, wherein attorneys are admissible and sworn. See the first section of the statute 2 G. 2. c. 23. and quære to what courts does the word *aforesaid* in § 23. refer?

An attorney's bill may be referred to be taxed, though all the business charged was done at the quarter sessions. *Ex parte Williams*, 4 T. R. 496. So a *dedimus potestatem* charged in an attorney's bill, is a sufficient item to enable the court to refer the bill for taxation, though with this exception it be entirely for conveyancing. *Ex parte Prickett*, 1 Bos. and Pul. N. R. 266.

The bill having been delivered a month before the commencement of the action^o, and the party charged not having made any application to have the bill taxed during that interval, he will not be permitted to question the reasonableness of the items before a jury (9).

In an action to recover the amount of a bill for business done by plaintiff as attorney to defendant^p, it appeared, that the bill, among other taxable items, contained two items, which could not be considered as "fees, charges, or disbursements, at law or in equity," viz. one item for costs paid upon a discontinuance, and another for preparing a case and laying it before a special pleader. It was admitted, that a bill had been delivered, but insisted that it had not been delivered according to the directions of the act^q, and it was contended, that the two items not being taxable, plaintiff was entitled to recover upon them without the previous delivery of a bill, for the imperfect delivery was tantamount to no delivery. Eldon C. J. said, "That the rule which had been adopted concerning charges for conveyancing either did not stand on any principle, or it decided this case; that the expenses of conveyancing, as such, were not taxable, they were not to be considered as "fees, charges, or disbursements, at law or in equity;" but if one single item, which might be so considered, though to the amount of 3s. 4d. only, was to be found in the bill, the plaintiff could not recover for the conveyancing without the delivery of such bill; for in such case the charges for conveyancing fell within the rule of the statute, and on these principles, namely, that what was paid for conveyancing was paid in the character and in the exercise of the duties of an attorney, and that the statute attached upon the whole demand, which he had in that character. If that were so, he did not see how the charges for conveyancing were to be distinguished from the two items in this case." The other judges concurred with the C. Justice, and it was holden, that the plaintiff could not recover for any part (10).

^o Williams v. Frith, Doug. 197.
^p Hooper v. Till, Doug. 198. 8. P.
^q Hill v. Humphreys, 3 Bos. & Pul.
 343.

^q It had been delivered at the defendant's counting-house instead of his dwelling-house, as the act directs.

(9) But the bill may be taxed after action brought, and at any time before the verdict or judgment, unless the money has been paid. Shaw v. Pickering, B. R. M. 30 G. 3. Doug. 198. in n.

(10) It may be observed, that in this case a bill had been delivered, but not at the place where the statute directed; but in a

The statute 2 Geo. 2. c. 23. § 23. only requires the delivery of a bill, for the purpose of bringing an action; and therefore, though an attorney cannot bring an action on his bill, till it has been delivered a month, that step is not necessary to be taken in order to enable him to set it off. But in this case he must not produce it at the trial by surprise; he ought to deliver it time enough to have it taxed before trial.

Delivery of the bill is conclusive evidence against an increase of charge in a subsequent bill on any of the items contained in it; and strong presumptive evidence against any additional items.

A copy of an attorney's bill (the original having been delivered to the defendant) will be received in evidence, without proof of notice to produce the original.

By stat. 12 G. 2. c. 13. § 6. "the provisions contained in stat. 2 G. 2. c. 23. § 23. shall not extend to any bill of fees, charges, and disbursements, due from any attorney or solicitor, to any other attorney or solicitor, or clerk in court, but every such attorney, &c. may use such remedies for the recovery of his fees, &c. against such other attorney or solicitor, as he might have done before the making of the said act."

It has been decided, that the object and spirit of this clause is, that the restrictions of 2 G. 2. c. 23. should not be applied where both parties were attorneys, when the action was brought, for in such case the defendant must be taken

^s Martin v. Winder, B. R. E. 22 G. 2. Dong. 199. n.

^s Loveridge v. Botham, 1 Bos. & Pul. 49.

^t Anderson v. May, 2 Bos. & Pul. 237.

case where a bill had not been delivered, Kenyon C. J. allowed the plaintiff to give evidence of conveyancing business, although he was precluded from recovering upon the rest of the demand, on account of having omitted to deliver a bill. Miller v. Towers, Peake N. P. C. 102. "As no bill had been delivered, Lord Kenyon felt himself at liberty to consider the demand for conveyancing, in the nature of a demand made in an action for conveyancing only." Per Lord Eldon C. J. in 2 Bos. and Pul. 345. The same doctrine was laid down in Mowbray, Gent. one, &c. v. Fleming, Trin. T. 49 G. 3. B. R. 11 East, 285. where no bill having been delivered, the plaintiff was permitted to recover for such items as were not taxable; although a bill of particulars had been delivered under a judge's order, and such bill contained other taxable items.

to be fully competent to understand the nature of the charges in the bill, and to resist them if exorbitant or improper. Hence an action may be maintained by one attorney against another^a, for business done by the plaintiff for the defendant before he became an attorney, without leaving a bill signed according to the directions of stat. 2 G. 2. c. 23. (11)

It is clearly established as a rule of practice, that negligence cannot be set up as a defence to an action on an attorney's bill^b; for the plaintiff does not come prepared to prove any thing more than the business done, and is not in a situation to meet a charge of negligence (12).

An attorney is not liable to be assessed in the poor rates in respect of the profits of his profession^c.

Assumpsit on an attorney's bill^d.—To prove that a copy of the bill had been delivered pursuant to the statute, the plaintiff's clerk was called, who swore that he had delivered to the defendant a bill signed by the plaintiff, containing an account of the business done. He was then proceeding to state the items of this bill from the plaintiff's books, when the defendant's counsel objected that no notice had been given to produce it. It was insisted that this was unneces-

^a Ford one, &c. v. Maxwell, one, &c. y R. v. Startivant, 7 T. R. 60.

^b H. Bl. 589.

^c Templer v. M'Lachlan, 2 B. & P. N. R. 136.

^d Philipson, Gent. one, &c. v. Chase, 2 Camp. N. P. C. 110..

(11) In Nelson v. Garforth, 1 Esp. N. P. C. 221, Lord Kenyon C. J. ruled, that where an action is brought by one attorney, for business done as an agent to another attorney, the plaintiff is not obliged to deliver a bill signed. See also Bridges one, &c. v. Francis, Peake's N. P. C. 1, 2. S. P. admitted. But the bill of an agent to an attorney in the country, may be taxed by the master. Dixon v. Plant, Doug. 199. n. [1.] 200 n. *Ex parte* Bearcroft, C. B. E. 7 Geo. 3. Doug. 200 n.

(12) "I do not go the length of saying that in no case can negligence in the party suing be used as a defence to the action, though I think it can only be used, where the negligence has been such, that the party for whom the business was done has thereby lost all possibility of benefit from such business." Per Sir J. Mansfield, S. C. The same doctrine was laid down by Lord Ellenborough, in Farnsworth v. Garrard, M. T. 48 G. 3. B. R. 1 Camp. N. P. C. 38. "The late Mr. Justice Buller thought (and I, in deference to so great an authority, have at times ruled the same way) that in cases of this kind, a cross action for the negligence was necessary; but that if the work be done, the plaintiff must recover for it. I have since had a conference with the judges on the

sary, and *Jory v. Orchard*, 2 Bos. & Pul. 39. and *Anderson v. May*, 2 Bos. & Pul. 237. were cited; but per Lord Ellenborough C. J. "If there are two contemporary writings, the counterparts of each other, one of which is delivered to the opposite party and the other is preserved, as they may both be considered as originals, and they have equal claims to authority, the one which is preserved may be received in evidence without notice to produce the one which was delivered. So it must have been in the cases which have been cited, and if a duplicate of the bill delivered is offered I am ready to receive it. But I am quite clear, that this evidence from the plaintiff's books is inadmissible to prove that a bill was delivered according to the statute. I approve of the practice as to notices to quit, and I remember when the point was first ruled by Mr. Justice Wilson, who said that if a duplicate of the notice to quit was not of itself sufficient, no more ought a duplicate of the notice to produce, and thus notices might be required in infinitum." Plaintiff nonsuited.

Liability of Attornies for Negligence.—An action on the case may be maintained by a client against his attorney for negligence or unskilfulness in the discharge of his professional

subject; and I now consider this as the correct rule, that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. The claim shall be co-extensive with the benefit." There is a distinction however in this respect between a contract and a security; for in an action on a bill of exchange, a partial failure of consideration is no defence; as where a bill had been accepted for the price of some hams, which turned out so bad that they were almost unmarketable; this was holden to be no defence, but the defendant must seek his remedy by a cross action. *Morgan v. Richardson*, 1 Camp. N. P. C. 40. n. recognised by Ld. Ellenborough C. J. in *Tye v. Gwynne*, 2 Camp. N. P. C. 346. In *Morgan v. Richardson*, money had been paid into court, but Ld. Ellenborough said, that that circumstance formed no ingredient in the opinion he then expressed. See further on this subject the case of *Fisher v. Samuda* and another, 1 Camp. N. P. C. 190. where Ld. Ellenborough expressed an opinion, that where an action has been brought for the value of goods furnished at a stipulated price, and the purchaser does not, either in bar of the action, or to reduce the damages, object to the quality of the goods, but allows the seller to recover a verdict for the full price agreed upon, he cannot afterwards maintain a cross action on the ground of the goods being of a bad quality, and unfit for the purpose for which they were ordered,

duty: as where an attorney neglected to charge a defendant (a prisoner) in execution within the time allowed by the practice of the court, by reason of which neglect the defendant was superseded; it was holden^a, that the action was maintainable against the attorney for negligence, but that as it sounded in damages, it was competent to the jury to find what damages they thought fit, and that they were not restrained to find the amount of the whole debt, in a case where it appeared that the debtor was not totally insolvent, and that the creditor might probably in time obtain some part of his debt by execution against his goods.

In an action against an attorney^b for suffering M. C. a debtor in custody at the suit of the plaintiff to be superseded, it was averred that M. C. was indebted to the plaintiff. It appeared in evidence that at the time of contracting the supposed debt, M. C. was a married woman. This was holden to be a fatal variance.

^a Russell v. Palmer, 9 Wils. 323. See Pitt v. Yalden, 4 Burr. 2060. ^b Lee v. Ayrton one, &c. Peake's N. P. C. 119.

C H A P. VI.

AUCTION.

Of Agreements relating to the Sale of Lands and Goods by Auction. Cases where the Duty attaches, Liability of Auctioneer. Recovery of Deposit and Interest on Defect of Title.

A SALE of *lands* by auction is within the 4th section (1) of the statute of frauds (29 Car. 2. c. 3.), and to make it binding, the solemnities required by that statute must be observed^a, and the auctioneer is not to be considered as the agent of both parties^b. With respect to sales of *goods* by auction, it has not been decided that such sales are within the 17th section (2) of the same statute; but the better opinion seems to be that they are. Assuming that they are, it has been determined that the auctioneer is the agent of both parties, and that a note or memorandum in writing of the bargain, made and signed by him, will be sufficient to

^a Walker v. Constable, 1 Bos. & Pul. 306.

^b Stansfield v. Johnson, 1 Esp. N. P. C.

101. Buckmaster v. Harrop, 7 Ves. 345.; but see Ld. Erskine's opinion S. C. 13 Ves. 473.

(1) By which it is enacted, that "no action shall be brought whereby to charge a defendant upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

(2) By which it is enacted, that "no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the same bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

give validity to the contract. The defendant bought a lot of goods for more than 10*l.* at an auction^c. Catalogues and conditions of sale were printed, and the defendant was the best bidder. The auctioneer wrote the defendant's name, and the price, against the lot in the printed catalogue, by order of the defendant. Between the day of sale and the time fixed by the conditions for taking the lot away, the defendant sent his servant to see them weighed, which he did. The defendant neglecting to take away the goods, they were resold at a considerable loss, and an action was brought for the difference; and the court strongly inclined —1. That sales by auction were not within the statute of frauds, because a number of persons are generally present, who can testify the terms of the contract; 2. They held the contract here was sufficiently reduced into writing and signed by an agent of the defendant's, for the auctioneer for that purpose was his agent (3); 3. They held the weighing by his servant was a delivery; 4. Yates J. held, that, as the contract was executory, viz. the lot to be taken away in six weeks, it was not within the statute (4).

A bidding at an auction may be retracted before the hammer is down, because the assent of the seller is not signified till that takes place^d.

Verbal declarations of the auctioneer, superadding any term to^e, or contrary^f to the printed conditions of sale, are not admissible in evidence.

An action will not lie against an auctioneer for selling a horse at the highest price bid for him^g, contrary to the owner's express directions, not to let him go under a larger sum.

^c Simon v. Motivos, 3 Burr. 1921. ^d Payne v. Cave, 3 T. R. 148.
 more fully stated in Bull. N. P. 280. ^e Powell v. Edmunds, 12 East, 6.
 under the name of Simon v. Metivier. ^f Gunnis v. Erhart, 1 H. Bl. 299.
 Best Report in 1 Bl. Rep. 599. cited ^g Bexwell v. Christie, Cowp. 395,
 in Mason v. Armitage, 13 Ves. jun. 25.

(3) This rule has been acted upon ever since this decision; and in conformity with such rule, it has been holden, that, upon sales made by brokers acting between the parties buying and selling, the memorandum in the broker's book, and the bought and sold notes transcribed therefrom, and delivered to the buyers and sellers respectively, are a sufficient compliance with the statute to render the contract of sale binding on each. See the opinion of Lord Ellenborough C. J. in *Hinde v. Whitehouse*, 7 East, 569.

(4) If any money is paid as a *deposit*, though short of the sum stipulated by the conditions, and accepted as such by the auctioneer, it will bind the bargain quoad the auctioneer. *Hanson v. Roberdeau*, Peake N. P. C. 120.

The plaintiff was an auctioneer, and employed by J. S. to sell his goods by auction^h. The sale was at the house of J. S. and the goods were known to be his property. The defendant bought goods to the amount of 7*l.* 9*s.* 6*d.*, and after packing them in a cart, which he had prepared ready at the door, paid the plaintiff 2*l.* 4*s.* 6*d.* in cash, and put a receipt into his hands for five guineas as for a debt due from J. S. to the defendant. While the plaintiff was hesitating about the propriety of taking the receipt in payment, the defendant drove off the cart with the goods: afterwards the plaintiff, being called upon by J. S., paid to him, as he refused to accept the receipt, the whole sum for which the goods were sold to the defendant, and brought an action against the defendant for goods sold and delivered, money had and received, &c. in order to recover the five guineas. After verdict for the plaintiff, Lord Loughborough, Gould J., and Heath J. were of opinion, that the action might be maintained, on the ground that an auctioneer has a special property in the goods which he is employed to sell, and that it is the same thing whether the goods be sold on the premises of the owner or in an auction-room. Wilson J. thought the verdict right, 1. Inasmuch as the party who has gained possession of the goods should be estopped from saying, to avoid a just payment, that there was not any property in him from whom the possession was derived; 2. That every part of the declaration was proved, and property was not stated to be in the plaintiff, but only that the goods were sold and delivered by him to the defendant, which was proved, and afforded a strong reason, why the defendant should not be permitted to dispute the effect of the sale and delivery.

If the owner of an estate, put up to sale by auctionⁱ, employ puffers to bid for him, it is a fraud on the real bidders (5), and, the highest bidder cannot be compelled to complete the contract.

^h Williams v. Millington, 1 H. Bl. 81.
ⁱ Howard v. Castle, 6 T. R. 642. recog-

nised by Grose and Lawrence Js. in
8 T. R. 93, 95.

(5) The owner may legally and fairly bid, either by himself or an agent, if before the bidding begins he gives public notice of his intention, and in such cases if he becomes the purchaser, he may claim an allowance of the duties, (see the statutes 17 G. 3. c. 50. s. 10. and 19 G. 3. c. 56. s. 12.) provided, that the notice required be given, and the delivery thereof verified upon the oath of the auctioneer, together with the fairness of the transaction.

If the agent of the owner put up an estate in so many lots², and no person bidding for the same, he puts it up again, in fewer lots at other prices, and still no person bidding, he puts it up again in one lot at a certain price, and on there not being any bidding, the estate is withdrawn from sale; this is not a *bidding* of the owner by an agent, so as to subject the party to the auction duty, for want of a notice in writing to the auctioneer (previously to the auction) of such agency, as required by statutes 19 G. 3. c. 56. (6) and 28 G. 3. c. 37. in order to excuse the owner from the payment of such duty.

R. Cruso v. Crisp, 3 East's R. 337.

(6) The statute 19 G. 3. c. 56. s. 5. reciting that a duty of 3*d.* is to be paid for every 20*s.* of the purchase money arising by sale at auction of any interest, &c. in any lands, &c. and 6*d.* for every 20*s.* out of the purchase money arising by sale at auction of all fixtures, furniture, &c. and that doubts may arise, whether the said duties are payable for any part of such purchase money not amounting to 20*s.*, to obviate such doubts, enacts and declares, that the said duties were intended to be charged for every 20*s.* of the said purchase money, and so in proportion, &c.

By sect. 6. "The said duties are declared to be a charge upon every auctioneer or seller by commission, immediately from and after the knocking down of the hammer, or other closing of the bidding, at every sale by way of auction: and that the duties so charged, shall be paid by every such auctioneer or seller by commission, in manner and at the times thereafter mentioned."

By sect. 7. "Every auctioneer receiving his licence, shall give bond to his Majesty in 200*l.*, with sureties, that he will within 20 days after each and every sale, by way of auction, deliver at the excise office in London, an exact and particular account in writing, of the total amount of the money bid at each sale, &c. and at the same time make payment of all such sums of money as shall be due to his Majesty in pursuance of this act, which sum he is thereby authorized to retain out of the produce arising by such sale, or deposit made at such sale, or otherwise recover the same by action of debt, or on the case, against such person by whom such auctioneer shall be employed, &c."

Provided (by sect. 12.) "that in case the real owner of any estate, &c. put up to sale by way of auction, shall become the purchaser by means of his own bidding, or the bidding of any other on his behalf, &c. at such sale, without fraud or collusion, then and in such case the commissioners of excise, &c. are authorized and required to make an allowance to such owner of the duties arising by this act upon such bidding, provided notice be given to the

An auctioneer was employed to sell an estate¹, the lowest price of which was fixed by the owner, and written down by him on a piece of paper, which was put under a candlestick, at the time of sale, with the privity of the auctioneer, but not signed by the owner, nor any notice in writing given to the auctioneer of the price so set down, nor had the auctioneer given the previous notice of the sale to the collector of the duty, as required by the acts of the 19 G. 3. c. 56. and 28 G. 3. c. 37.; but being asked at the sale, whether he had taken the proper precautions to avoid the duty in case there were no sale, he said, that it was his mode to fix a price under the candlestick, and if the bidding did not come up to that price, it was no sale or duty: It was holden, that the duty having attached, though there were no sale, for want of taking the precautions required of the owner by the statutes, under such circumstances, and the auctioneer having been sued for the duty on his bond to the crown, and compelled to pay it, he could not recover it over against the owner; he having in effect warranted, that proper precautions had been taken to prevent the duty attaching in the event, though both parties were mistaken as to the law.

In an action for money paid, laid out, and expended, it appeared in evidence, that the defendant had employed the plaintiff, an auctioneer, to sell an estate. The plaintiff accordingly put it up to sale, and it was knocked down to a purchaser, who afterwards refused to complete his purchase, on the ground of a defect in the title. An action was brought against the present plaintiff to recover the deposit; notice of the action was given to the defendant, and he was required to defend it, but declined: whereupon the plaintiff paid the deposit and interest, together with costs of suit, and now brought this action to recover the same as well as the auction duty, which he had been compelled to pay. Lord Ellenborough C. J. "The money paid on account of

¹ *Capp v. Topham*, 6 East's R. 392.

" auctioneer before such bidding, both by the owner and the person
 " intended to be the bidder, of the latter being appointed by the
 " former, &c. to bid," &c. &c. and in case of any unfair practice,
 " then no such allowance shall be made;" and by stat. 28 G. 3. c.
 37. s. 20. this notice to the auctioneer is required to be given in
 writing. See further, statutes relative to auctions and auctioneers,
 29 G. 3. c. 63.—32 G. 3. c. 11.—36 G. 3. c. 123. s. 1.—37 G. 3.
 c. 14. duties.—38 G. 3. c. 54. s. 2, 3.—42 G. 3. c. 93. s. 1, 2, 3.
 amended by 43 G. 3. c. 120.—45 G. 3. c. 30. duties.

² See 42 G. 3. c. 93. s. 1, 2.

the costs in the cause, cannot be recovered in this form of action, which is for money paid only; to recover in such action, it should appear *clearly* to be money actually and necessarily paid to the use of the party. There should have been a special count, inasmuch as the right of the plaintiff to the costs is not so apparent. The plaintiff might have defended the action of his own wrong, and without any authority from the defendant. If he had done so, he would not be entitled to call upon his principal to pay the costs, and in that case they would have been incurred without his consent. If the plaintiff had declared specially, the defendant would then have had notice of these points, the plaintiff's claim would have been on the record, and the defendant might have been prepared to contest it, which, under the present declaration, he cannot; the plaintiff may recover for the money actually paid on the other accounts." *Spurrier v. Elderton*, 5 Esp. N. P. C. 1.

Where an estate is sold by auction^m, if a good title is not made out according to the conditions of sale, and an action is brought against the auctioneer for the recovery of the deposit who pays money into court, such action may be maintained, the deposit not appearing to have been paid over to the principal (7).

It must be observed, however, that in this action the deposit only, with interest from the time of sale, and not any further damages for the supposed goodness of the bargain, can be recoveredⁿ. In cases of this kind, it is proper to add to the declaration a specific count for the interest; for interest cannot be recovered on a count for money had and received^o. The expenses incurred in investigating the title may be recovered, if laid in the declaration as special damage^p, but not on the count for money paid^q.

Assumpsit for money had and received^r. Plea, N. A.

^m *Borough v. Skinner*, 5 Bur. 2639.
ⁿ *Flureau v. Thornhill*, 2 Bl. Rep. 1078.

^o *Walker v. Constable*, 1 Bos. & Pul. 307. *Tappenden v. Randall*, 2 Bos. & Pul. 472. *Sed quære*.

^p *Bratt v. Ellis*, *Sugden's Law of V. and P.* p. 588. ed. 3rd. *Jones v.*

Dyke, *ib.* 589. *Turner v. Beaumont*, *ib.* 177. *Richards v. Barton*, 1 Esp. N. P. C. 268.

^q *Camfield v. Gilbert*, 4 Esp. N. P. C. 221.

^r *Berry v. Young*, 2 Esp. N. P. C. 640.

(7) Auctioneer is personally liable where he does not name his principal. Per Kenyon C. J. *Hanson v. Roberdeau*, *Peake's N. P. C.* 120.

This action was brought to recover the deposit money paid by plaintiff, who was the purchaser of an annuity sold by defendant (an auctioneer) at a public auction. One of the conditions of sale was, that a good title should be made out by the 10th of July. In the beginning of July the plaintiff called on the seller of the annuity to shew him the title deeds, but he not having them in possession, gave him an abstract of the title which did not mention any of the deeds. Bearcroft suggested that application ought to have been made to the vendor at an earlier period, in order to enable him to procure the title deeds by the 10th of July.

Kenyon C. J. "A seller of an estate ought to be prepared to produce his title deeds at the particular day. A court of equity will, under particular circumstances, enlarge the time^a; but then, the circumstances entitling him to such indulgence must clearly appear, which is not the case in this instance. It is objected that the plaintiff had no right to the possession of the deeds: but though he had no right to keep them, he had a right to inspect. A court of equity would have obliged the vendor to give attested copies of the deeds at his own expense, with an undertaking to produce them thereafter at the vendee's expense for the support of his title. As the seller has here failed in completing his engagement, plaintiff is entitled to a return of the deposit." Verdict for plaintiff 280*l.* amount of deposit.

An action for money had and received was brought to recover the amount of a deposit paid by the plaintiff to the defendant^a, on an agreement for the purchase of an estate, the defendant having failed to make out a good title on the day when the purchase was to be completed. The abstract of the title delivered to the plaintiff began in the year 1793, and after reciting that the deeds relating to the estate had been lost, stated a fine and non-claim. Upon inquiry it was found that the fact of the deeds having been lost was not true. The counsel for the defendant said, they were ready to make out a good title. Kenyon C. J. "As to the sentiments which I have long entertained relative to the purchase of real estates, I find no reason for receding from them. They have been confirmed by conversing with those, whose authority is much greater than mine. The vendor must be prepared to make out a good title on the

^a Langford v. Pitt, 2 P. Williams, 630. But see Lloyd v. Collett, in Court of Chancery, 28th Nov. 1793, on motion for injunction. 4 Bro. C. C. 469. 4 Ves. jun. 609. cited

also by Graham, Baron, in Omerod v. Hardman, 5 Ves. jun. 737. See also Wynn v. Morgan, 7 Vesey, 202. t Cornish v. Rowley, B. R. Middlesex Sittings after M. T. 40 G. 3. MSS.

day when the purchase is to be completed. Indulgence, I am aware, is often given for the purpose of procuring probates of wills, letters of administration, and acts of parliament. But this indulgence is voluntary on the part of the intended purchaser; it is the duty of the seller to be ready to verify his abstract at the day, on which it was agreed, that the purchase should be completed. If the seller deliver an abstract, setting forth a defective title, the plaintiff may object to it. No man was ever induced to take a title like the present. A fine and non-claim are good splices to another title, but they will not do alone. There are many exceptions in the statute in favour of infants, femmes covert," &c. Erskine for the defendant: "Do I understand your Lordship to say, that though the defendant can now make out a good title, yet as that title did not form a part of the abstract, the plaintiff may avail himself of that circumstance?" Kenyon C. J. "He certainly may, and avoid the contract. When the abstract is delivered by the seller, he must be able to verify it by the title deeds in his possession. As a good title was not made out at the day fixed, I shall direct the jury to find a verdict for the deposit, with interest up to that day." The jury found a verdict for the plaintiff accordingly.

CHAP. VII.

BANKRUPT.

- I. *Of Persons liable to be Bankrupts.*
- II. *Of Persons not liable to be Bankrupts.*
- III. *Of the several Acts of Bankruptcy.*
- IV. *Of Property in the Possession of the Bankrupt as reputed Owner.*
- V. *Of Payments made to and by Bankrupts, protected by Statutes.*
- VI. *Of Actions which may be brought by the Assignees of a Bankrupt, and in what Manner they ought to sue.*
- VII. *Of Actions by the Bankrupt.*
- VIII. *Of the Pleadings.*
- IX. *Of the Evidence, and Witnesses.*

I. *Of Persons liable to be Bankrupts.*

ANY person (1) being a trader, and capable of contracting in the way of trade, may become a bankrupt.

(1) Lord Hardwicke Ch. refused to supersede a commission which had been taken out against a clergyman, who was proved to have been a trader, and had committed an act of bankruptcy, although it was urged that clergymen were prohibited from trading by stat. 31 H. 8. c. 13. s. 5. and that all contracts made by them in trade, were by that statute declared to be void. *Ex parte Meymot*, 1 Atk. 196.—See also p. 201, of the same book, where Lord Hardwicke said, that a commission of bankruptcy had been taken out against a peer, an Earl of Suffolk, for trading in wines; and though

A feme covert, sole trader according to the custom of London, may bind herself by contracts made for the support of her trade, and consequently a commission of bankrupt may be taken out against her with respect to her separate effects in trade^a.

The term "*bankrupt*," is appropriated exclusively to traders, and to such traders only, as are either within the general or specific descriptions contained in the several statutes relating to bankrupts. From those statutes, and the construction which they have received in adjudged cases, it may be collected, that the following persons are subject to the bankrupt laws, viz.

Any person, natural born subject^b, alien^c, or denizen using the trade of merchandize by way of bargaining, exchange, re-exchange, bartry, chevesance, or otherwise, in gross or by retail, or seeking his or her trade or living, by buying and selling; banker^d; brickmaker, that is a person who rents a brick ground, and makes bricks thereon for public sale^e (2); broker^f (4); butcher^g; factor^h; shoemakerⁱ (5).

a *Layie v. Phillips*, 3 Burr. 1776. and 1 Bl. R. 570.

b 13 Eliz. c. 7. s. 1. 1 Jac. 1. c. 15. s. 2.

c 21 Jac. 1. c. 19. s. 15.

d 5 G. 2. c. 30. s. 39.

e *Wells v. Parker*, B. R. 1 T. R. 34. reversing the judgment of C. B. (3)

Sutton v. Weeley, 7 East, 442.

f 5 G. 2. c. 30. s. 39.

g *Dally v. Smith*, 4 Burr. 2148.

h 5 G. 2. c. 30. s. 39.

i *Crampe v. Barne*, Cro. Car. 31. *Stanley v. Osbaston*, Cro. Eliz. 268.

there might be some powers that the commissioners of bankrupts could not exercise against a peer, yet, notwithstanding this, he might be liable to a commission of bankruptcy, *if he would trade*; and so might a member of the House of Commons. See also *Higmore v. Molloy*, 1 Atk. 206. where Lord Hardwicke said, that a public officer, as an exciseman, &c. if a trader, made himself subject to the bankrupt laws. A servant of an ambassador may be a bankrupt. 7 Ann. c. 12. s. 5.

(2) Lord Thurlow Ch. held, that a person who sold large quantities of bricks, made of earth taken from the waste, without any licence from the lord, was a trader. *Ex parte Harrison*, 1 Bro. Ch. Ca. 173.

(3) It must be observed, that a writ of error was brought on this decision in the House of Lords, which was there argued, and thereupon the following questions were put to the judges: 1. whether the finding in the special verdict was sufficient, whereupon to give final judgment; 2. if the finding was insufficient, what award ought to be made on such finding; 3. whether, if the finding was sufficient, the plaintiff in error appeared to be a trader within the

Innkeepers^k and publicans^l, who sell liquors out of their houses in large quantities to *all* persons who apply for them, have been holden to be traders. So a person, who having been a horse-dealer, became a farmer, and in two years bought and sold, for profit, five or six horses, not calculated for the farming business^m. The rule in these cases, is, that where a person holds himself forth to the public as a general dealer in the articles which he buys and sells, or in other

^k Patman v. Vaughan, 1 T. R. 572.
^l Holme & Wilson assignees of Pierce
 v. Bough, B. R. London Sittings,
 July 19, 1806. coram Ellenborough
 C. J. MSS.

^m Bartholemew v. Sherwood, 1 T. R.
 578 n. Stewart v. Ball, C. B. M.
 46 G. 3. 2 Bos. & Pul. N. R. 78 &
 post.

true intent and meaning of the statutes concerning bankrupts? And the Lord Chief Baron having delivered the unanimous opinion of the judges present upon the first question in the negative, and upon the second question, that a writ of *venire facias de novo* ought to be awarded, it was thereupon ordered and adjudged, that the judgment given in the Court of King's Bench, reversing a judgment given in the Court of Common Pleas, should be reversed, and that the judgment given in the Court of Common Pleas should also be reversed, and that the special verdict given by the jury being insufficient should be annulled, and that the Court of King's Bench should award a *venire facias de novo*, and proceed according to law. 1 Bro. P. C. 545. Tomlins's edit. The plaintiff did not proceed on the *venire facias de novo*, but brought another action in the Common Pleas, which was afterwards dropped, and an action brought in the King's Bench, which was tried before Mr. Justice Buller and a special jury, 7th Dec. 1787; the jury found a special verdict; but it appearing that the plaintiff had left off brickmaking at the time when the petitioning creditor's debt accrued due, the defendant waived the special verdict, and a general verdict was entered for the plaintiff.

(4) "I am inclined to think a pawnbroker within the general words of the 39th clause of 5 G. 2. c. 30. for though pawnbrokers are not expressly named, yet the general word 'brokers' is the genus, and all other kinds of brokerage the species." Per Lord Hardwicke Ch. in Highmore v. Molloy, 1 Atk. 206. Stockbrokers, buying and selling stock by commission, are clearly within the statutes. Cullen, 18.

(5) To the trades here enumerated may be added the following, which are *said* to be within the statutes of bankrupts, viz. bakers and tanners*. Lord Hardwicke (Ex p. Burchall, 1 Atk. 141.) declared he was clearly of opinion, that a scrivener was within the 5 G. 2. c. 30. s. 39., and comprehended in the words bankers, brokers, and factors.

* Per Cur. 3 Mod. 320.

words; seeks his living by buying and selling those articles, such person is subject to the bankrupt laws.

A person who resides abroad, but who trades to England, coming over here occasionally, is an object of the bankrupt laws:

A. was a native of Scotland, and resided at Edinburgh, where he carried on a trade, and traded to all parts of the world. Being indebted, he came to England, where he was arrested, and lay in prison two months. It was adjudged, that A. was a person within the description of the bankrupt laws".

A trader, having retired from business, may become a bankrupt in respect of debts contracted during the period of his trading^o.

The proper facts having been found by a jury, it is the province of the court to determine, whether a person be a bankrupt within the meaning of any statute^p.

II. *Of Persons not liable to be Bankrupts.*

PERSONS cannot be made bankrupts for debts, which the law will not oblige them to pay. Hence, neither infants^q, nor femmes covert^r, (except such femmes covert, as are either sole traders, or may be considered as femmes sole) are subject to the bankrupt laws.

The buying and selling the profits of land by a person having a chattel interest therein^s, is not a buying and selling within the statutes of bankrupt. Hence, where J. S. purchased a coal-mine for so long a time as any coals could be gotten therein, paying annually a certain rent, (subject to a right of re-entry in the seller in case of non-payment of the rent) and worked the mine, and sold the coals, it was holden, that he was not an object of the bankrupt laws.

A person who had drawn bills for the purpose of raising money for the improvement of his estate^t, and had borrowed accommodation bills, in lieu of which he had given his

n Alexander v. Vaughan, Cowp. 398.
and cases there cited. Williams v.
Nunn, 1 Taunt. 270. and post. p. 175.

o Anon. 1 Vent. 5.

p Dodsworth v. Anderson, 2 Jo. 142.
cited by Ryder C. J. Say, 193.

q Ex parte Sydebottom, 1 Atk. 146.
R. v. Cole, Lord Raym. 443. S. P.
Per Holt C. J.

r Ex parte Mear, 2 Bro. Ch. C. 266.

s Port v. Tarton, 2 Wils. 169.

t Hankey v. Jones, Cowp. 745.

own bills, was holden not to be within the statutes of bankrupts.

A farmer^a, who *occasionally* buys and sells hay, corn, horses, &c. with a view to profit, but without making them the means of seeking his living, does not thereby subject himself to the bankrupt laws.

A builder^x, who buys timber which he works into the houses which he builds, and sells the houses when built, is not a trader within the meaning of the bankrupt laws.

The principle of the bankrupt laws, as it is to be found in the statute 34 & 35 H. 8. c. 4. is "to prevent persons craftily obtaining into their hands great substance of other men's goods, and at their own wills and pleasures, consuming the substance obtained by the credit of other men:" and the subsequent statutes were made for the better providing against the persons described by that statute, and for the more accurately defining who ought to be taken to be a bankrupt; in no one of which is there any term made use of which is not descriptive of persons to whom, in the actual course of their business, extensive credit is given, and that for the very purpose of carrying it on. And where particular employments are not specified, the general description cannot be satisfied, unless there be *both a buying and selling*: this is implied in the words, using the trade of merchandise; for a merchant is so denominated from his being *a buyer to sell again*. Hence it was holden^y, that a devisee for life of an estate, part of which consisted of brick ground, making bricks there for sale generally, with a view to profit, was not a trader within the meaning of the bankrupt laws, although he purchased the coals and some of the wood used in burning the bricks; for he could not be considered as the buyer of any thing to sell again, nor as a person, the course of whose business required that he should obtain great substance of other men's goods upon credit; and the selling the soil, in a state essentially altered by various processes of manufacture, did not alter the character of the land-owner, nor convert him into a person, who could properly be said to carry on the trade of merchandise.

So building on a person's own land, for whatever purpose, cannot be considered as a buying and selling^z.

Contractors for victualling the royal navy^a, drovers of

^a Stewart v. Ball, 2 Bos. and Pul. N. B. 78.

^x Clarke v. Wisdom, 5 Esp. N. P. C. 147.

^y Sutton v. Weeley, 7 East, 442.

^z Williams v. Stevens, 2 Camp. N. P. C. 300.

^a Littleton's case, 1 Vent. 270.

cattle^b (6), farmers^c, graziers^d, innkeepers^e, alehouse-keepers or victuallers^f, and receivers-general^g of parliamentary taxes, are not objects of the bankrupt laws (8).

By particular statutes, the holders of stock in various trading companies, are declared not liable to be made bankrupts in respect of their stocks in such companies: as the members of the Bank of England^h, East Indiaⁱ, English Linnen^k, Guinea^l, London Assurance^m, Royal Exchange Assuranceⁿ, South Sea^o Companies, &c. &c.

b 5 G. 2. c. 34. s. 40.

c lb.

d lb.

e Newton v. Trigg, 3 Lev. 310. Skin. 991. Carth. 149. 3 Mod. 327. S. C. (7).

f Saunderson v. Rowles, 4 Burr. 2064.

g 5 G. 2. c. 20. s. 40.

h 8 and 9 W. 3. c. 20. s. 47. 7 Anne, c. 7. s. 59. 3 G. c. 8. s. 43.

i 13 & 14 Car. 2. c. 24. s. 3. 9 and 10 W. 3. c. 44. s. 74.

k 4 G. 3. c. 37. s. 13.

l 13 & 14 Car. 2. c. 24. s. 2.

m 6 G. 1. c. 18. s. 10.

n lb.

o 9 Anne, c. 21. s. 42. 3 G. 1. c. 7. s. 7. 5 G. 1. c. 19. s. 27. 6 G. 1. c. 4.

s. 55. 8 G. 1. c. 21. s. 12.

(6) A person who buys and sells cattle at one fair, keeps them three or four days on his own ground, and then drives them to another, is a drover within the meaning of this statute. *Mills v. Hughes*, Willes, 588. A farmer occupying a farm of the value of £700 per annum purchased cattle (beyond what his farm would maintain by its own produce) at one fair, kept them on his farm and sold them at another fair. It was holden, that such person was either farmer, grazier, or drover, within the meaning of this statute, and consequently not subject to the bankrupt laws. *Bolton v. Sowerby*, B. R. Trin. 49 G. 3.

(7) In this case it was also found, that J. S. had built a ship, and had a share therein, and also 500*l*. stock upon the said ship *ad merchandizandum*, but it was not found that he traded therewith, or that he any wise traded in the ship; it was resolved by the court, that the building and having a share in a ship, was no more than if a man had a share in a barge or coach which were let to hire, &c. and that his having some stock in a ship did not make him a merchant; because it was usual for persons to adventure some particular things in such a ship for such a voyage, but that would not make them traders within the statutes, &c. for by those statutes, professed merchants only were meant, or such who were in constant trading.

See also *Cotton v. Daintry*, 1 Vent. 29. and *ex parte Bowes*, 4 Vesey, jun. 168. where Lord Loughborough Ch. held, that the part owner of a ship who had let it out to freight, and received freight, was not an object of the bankrupt laws.

(8) Lord Kenyon C. J. held, that a schoolmaster's buying school books and shoes, and retailing them to his scholars, was not a trading within the bankrupt laws. *Valentine v. Vaughan*, Peake N. P. C. 76.

III. *Of the several Acts of Bankruptcy (9).*

THE several acts of bankruptcy, which are mentioned in stat. 13 Eliz. c. 7. s. 1. being repeated in the stat. 1 Jac. 1. c. 15. s. 2. it will not be necessary to set forth the statute of Elizabeth.

By stat. 1 J. 1. c. 15. s. 2. it is enacted, that any person using the trade of merchandize, &c. who shall,

1. "Depart the realm;"
 2. "Or begin to keep house;"
 3. "Or otherwise to absent himself;"
 4. "Or suffers himself willingly to be arrested for any debt or other thing, not grown due, for money delivered, wares sold, or any other just thing or lawful cause, or good consideration or purposes;"
 5. "Or shall suffer himself to be outlawed;"
 6. "Or yield himself to prison;"
 7. "Or willingly or fraudulently procure himself to be arrested, or his goods to be attached or sequestered;"
 8. "Or depart from his dwelling-house;"
 9. "Or cause to be made any fraudulent grant or conveyance of his lands, tenements, goods, or chattels;"
- "To the intent, or (10) whereby his creditors may be

(9) It appears to have been the opinion of Lord Hardwicke Ch. in *ex parte* Smith, cited in *Alexander v. Vaughan*, Cowp. 402. that an act of bankruptcy committed abroad would not support a commission.

(10) In *Fowler v. Padget*, 7 T. R. 509. it was holden that the word "or" in this part of the statute meant "and." But in *Robertson v. Liddell*, B. R. E. 48 G. 3. 9 East, 487. this construction was over-ruled, and it was decided that the words "or whereby" did not carry the sense any further than "to the intent;" and that they were equivalent to the words "or that thereby;" and this construction of the statute was most consistent with the corresponding clause in the 13 Eliz. c. 7. and the general scope of the bankrupt laws; and consequently if any of the before specified acts were done with an intention to delay creditors, the party must be adjudged a bankrupt, although no actual delay were proved.

“defeated or delayed, for the recovery of their just and true debts;” (11)

10. By stat. 21 Jac. 1. c. 19. s. 2. “Any person using the trade of merchandize, &c. who shall, either by himself or others, by his procurement, obtain any protection other than such person as shall be lawfully protected by privilege of parliament;”

11. Or exhibit any petition or bill against his creditors, to compel them to accept less than their just debts, or to procure time;”

12. “Or being arrested for debt, shall, after his arrest, lie in prison two months or more, upon that or any other arrest or detention in prison for debt;”

13. “Or being arrested for the sum of 100*l.* or more of just debt, shall, after such arrest, escape out of prison;”

“Shall be adjudged a bankrupt, and in the case of arrest or lying in prison, from the time of the first arrest.”

14. By stat. 5 G. 2. c. 30. s. 24. “If any bankrupt, after issuing of any commission against him, pay to the person who sued out the same, or otherwise give or deliver to such person goods, or other satisfaction or security, for his debt, whereby such person shall privately have and receive more in the pound in respect of his debt than the other creditors, such payment of money, delivery of goods, or giving greater or other security or satisfaction, shall be deemed to be an act of bankruptcy, whereby, on good proof thereof, such commission shall and may be superseded.”

Doubts having arisen, whether a commission could be sued out against traders, entitled to privilege of parliament, during the continuance of such privilege, and such persons not being compellable to become bankrupts, by reason of the freedom of their persons from arrests upon civil process, it was enacted, by stat. 4 G. 3. c. 33. “that the creditors to a certain value, viz. one creditor, or two, being partners, to the amount of 100*l.*, two creditors to the amount of 150*l.*, and three to the amount of 200*l.* of any trader within the description of the bankrupt laws, having pri-

(11) The conclusion of the corresponding section in the statute of Elizabeth is, to the intent or purpose to defraud or hinder any creditor of his just debt or duty.

“ privilege of parliament, may (upon affidavit of the debt, and
 “ trading of the debtor, filed of record in any of the courts
 “ at Westminster) sue out a summons, or original bill and
 “ summons, against such trader, and serve him with a copy ;
 “ and if he shall not, within two months after personal
 “ service, pay, secure, or compound the debt, or enter into
 “ a bond in such sum, and with two such sureties as the
 “ court shall approve of, to pay such sum, as shall be re-
 “ covered in such action, with costs, he shall be adjudged a
 “ bankrupt from the time of the service of such summons.”

This provision of the legislature was salutary, but having on some occasions, where bonds had been given in pursuance thereof, been rendered nugatory by the difficulty, and sometimes by the impossibility, of enforcing the entering appearances in the actions, for the payment of the sums to be recovered, in which such bonds had been given (12), it was enacted by stat. 45 G. 3. c. 124. s. 1. that, “ when
 “ any summons, or original bill and summons, shall be sued
 “ out against any person, deemed a merchant, banker, bro-
 “ ker, factor, scrivener, or trader, within the description of
 “ the acts relating to bankrupts, having privilege of par-
 “ liament, and such affidavit of the debt duly made and
 “ filed, as in the act of the 4th G. 3. c. 33. mentioned, and
 “ such merchant, &c. shall enter into such bonds as in the
 “ said act mentioned, to pay such sum as shall be recovered
 “ in such action, together with such costs as shall be
 “ given in the same ; every such merchant, &c. shall also,
 “ within two months after personal service of such sum-
 “ mons, cause an appearance to be entered to such action
 “ in the proper court in which the same shall have been
 “ brought, and on default thereof he shall be adjudged
 “ bankrupt from the time of the service of such summons :
 “ and any creditor may sue out a commission against any
 “ such person, and proceed therein in like manner as against
 “ other bankrupts.” And by the third section, after re-
 citing, that the proceeding by distringas was extremely
 dilatory and expensive, it is enacted, that “ when any sum-
 “ mons, or original bill and summons, shall be sued out
 “ against any person having privilege of parliament, and no
 “ such affidavit shall be made and filed as in the said act of
 “ the 4th G. 3. c. 33. and hereinbefore is mentioned, if the

(12) The inconveniences which resulted from the imperfect provision of the stat. 4 G. 3. c. 33. are fully set forth in a letter, signed Alfred, Cobbett's Political Register, vol. viii. p. 26.

"defendant shall not appear at the return of the summons,
 "or within twenty-eight days after such return, in every
 "such case it shall be lawful for the plaintiff, upon affidavit
 "being made and filed in the proper court of the personal
 "service of such summons (which affidavit shall be filed
 "gratis) to enter an appearance or appearances for the de-
 "fendant, and to proceed thereon as if such defendant had
 "entered his appearance."

The remaining sections of this statute provide for compelling an appearance in courts of equity, under similar circumstances.

1. "*Departing the Realm.*"

SINCE the decision in *Robertson v. Liddell*^{*}, in which the construction laid down in *Fowler v. Padget*, 7 T. R. 509. was over-ruled, merely departing the realm, although it is not proved that any creditor was thereby defeated or delayed in the recovery of his debt, if such departure was with an intention so to defeat or delay them, will constitute an act of bankruptcy (13).

p 9 East, 437. See also 1 Taunt. 976.

(13) In the case of *Woodier*^{*}, a mercer on Ludgate Hill, against whom his going beyond sea being given in evidence, it was insisted, that shewing *quo animo* he went abroad, (viz. on account of having killed his wife) this could not be construed an act of bankruptcy; but it appearing that his creditors were thereby in fact prevented from recovering their debts, *Reeves C. J.* held, that this was an act of bankruptcy; but if this fact had not appeared, it would have been otherwise.

So in *Raikes and others assignees of Hervey v. Poreau*[†], which was an action for money had and received, it appeared that Hervey had left England with a young woman, who had refused to live with him as a mistress, unless he took her abroad. The defendant, a relation of the young woman and a creditor of Hervey, followed him to Holland, and there obtained from him a bill, for the amount of which this action was brought. *Buller J.* said, that if it were necessary to say, whether the bankrupt left the kingdom with an intention to delay his creditors, he thought no great doubt could be entertained; but that point it was unnecessary to decide, for it had been settled in *Woodier's* case, that if a man went abroad, though not with the intention to delay his creditors, and in fact they were delayed, it was an act of bankruptcy; and he added, that he did

* *Woodier's* case, Bull. N. P. 39. † *Raikes v. Poreau*, Co. B. L. 5th edit. p. 73.

B. and C. having been partners in trade¹ in London, under the firm of B. and C., upon a dissolution of this partnership agreed that C. should, from that time, carry on trade in London on his sole account, and that B. should establish and conduct a house of trade in Dublin, under the firm of B. and C., in the profits of which C. should equally participate; that all goods ordered by B. to be purchased by C. in England, and sent by him for the use of B. and C., to be sold in Dublin, should be charged by C. to the firm at prime cost only. It did not appear that the creditors in general were apprized of this alteration. B. having come over to London for the purpose of making some arrangements with his creditors, was informed, a few days before the time which he had fixed for a meeting with them, that J. S. was about to arrest him on the following day. J. S. had furnished to the order of C., goods, which had been sent to B. and C. for sale, J. S. knowing, when he accepted the order that they were destined for B. and C., and having credited them in his books. C. sent the goods to B. and C. without charging any profit on them. B. in consequence of the intimation, immediately returned to Dublin, to avoid being arrested. During the whole of his residence in Dublin, he had continued to keep his former house in London; his name was on the door, and his wife and family had continually resided in it. The court adjudged that there was a debt due from B. to J. S.; because the goods were furnished on the joint account,

q *Williams v. Nunn*, 1 Taunt. 270.

not know that Woodier's case had ever been over-ruled. In a subsequent case of *Vernon v. Hankey*†, London Sittings after T. 27 Geo. 3 *Butler J.* expressed the same opinion, observing that the point had not been before the court since Woodier's case, but that case had always been considered and acted upon as good law.

These decisions at *Nisi Prius* clearly establish a different rule of construction from that laid down in the text of this work, and that the mere fact of departing the realm, if a creditor is thereby actually delayed is sufficient to constitute an act of bankruptcy, although the debtor had not any such intention; but as was truly observed by Lawrence J. in *Fowler v. Padget*, 7 T. R. 516. "These cases might have received the same determination, though on a different ground; for though it was not the immediate object of the parties to delay their creditors by going abroad, yet as that must be the necessary consequence of such an act, it would be evidence of their intending to delay or defeat their creditors."

† *Vernon v. Hankey*, Co. B. L. 5th edit. p. 98.

and that B. had committed an act of bankruptcy by departing the realm with an intent to delay a creditor.

2. "*Beginning to keep House.*"

The observation which has been made on the act of departing the realm may be repeated here, viz. that the beginning to keep house with intent to delay creditors, will constitute an act of bankruptcy, although it is not proved that a creditor was in fact delayed. The intention to delay creditors must be found, in order to complete the act of bankruptcy, but the time during which the debtor has kept house is immaterial, whether it be an hour or a day.

The usual evidence of this act is a denial to a creditor, who calls for money (14).

In *Dickinson v. Foord*, Barnes 160. it was holden, that keeping house with intent to delay creditors, without an actual denial, was sufficient; but in *Garret v. Moule*, 5 T. R. 575. a different rule was laid down, viz. that there must

r Agreed in *Heylor v. Hall*, Palmer, 325.

(14) "A denial by order of a trader to a creditor is not of itself an act of bankruptcy, but only evidence of it, and therefore to be explained. If a man is sick, or if a man lives three days in business, and the rest of the week in the country, this explains a denial at any other house or lodging at any other part of the town, saying, "Go to the shop." On the other hand, it is not necessary, in order to constitute a denial an act of bankruptcy, that the bankrupt should have given orders to deny any particular person by name: if he gives orders to be denied to *every body*, it includes creditors, and is a keeping the house within the meaning of the statute. Per Lord Mansfield C. J. in *Round v. Hope and Byde, Co.* B. L. 5th edit. p. 94. "Although an authorised denial to a creditor requiring to see his debtor, is the most usual and familiar evidence of *beginning to keep house* within the meaning of the statute, it is not the only evidence by which this may be proved. If a trader has no servant, the act cannot be evinced through such a medium. In that case, if he shuts himself up in his house, debarring all access to it, whereby his creditors are delayed, an act of bankruptcy is established, by proof of his having done so. And, generally, if a trader secludes himself in his house to avoid the importunity of his creditors, who are thus deprived of the means of communicating with him, he *begins to keep house* within the meaning of the legislature, and commits an act of bankruptcy." Per Lord Ellenborough C. J. in *Dudley v. Vaughan*, 1 Camp. N. P. C. 272.

be an actual denial to a creditor, with intent (15) to delay him; and Lord Kenyon C. J. said, that on trials in cases of this kind, the question had always been asked, whether or not the debtor was denied to the creditor. So, in *Hawkes v. Saunders*, Co. B. L. 5th edit. p. 79. it was holden, that an order to be denied, without an actual denial, was not sufficient (16). But if the trader gives a general order to be

(15) "The denial of the party must be with an intent to delay creditors; therefore being denied when sick in bed, (or engaged in company, will not be an act of bankruptcy; and Lee C. J. in *Field v. Bellamy*, H. 15 G. 2. was of this opinion, where the denial was by agreement in order to take out a commission. But in *Bramley v. Munde*, London Sitings, 2d June, 1736, Foster J. held it sufficient proof of an act of bankruptcy: the fact proved was, that the party (in consequence of an agreement made at a meeting of the creditors two hours before, at which he and the plaintiff were) was denied to the plaintiff's clerk, who was sent to demand money: *tamen quære*, for how can such a denial be said to be with intent to delay the creditor? Probably the defendant himself, in this case, had concerted or been privy to the committing the act of bankruptcy: and under such circumstances a denial by agreement has in many cases been holden to be sufficient proof of an act of bankruptcy. For where a person has been assisting in procuring such act of bankruptcy to be committed, it does not afterwards lie in his mouth, nor shall he be permitted to say, it was fraudulent or ineffectual. But such act of bankruptcy will be of no avail against persons who were not privy to it." *Buller's Nisi Prius*, 39, 40. See also *Cawley v. Hopkins*, Co. B. L. "I doubt how far an act of bankruptcy committed by consent and agreement is valid, with respect to a third person not privy to such agreement. Certainly the bankrupt himself, and all those who come in under the commission, are concluded to say any thing against it. But the relation of a commission of bankrupt to the time of committing the act, though useful to prevent frauds, is sufficiently hard already upon private persons; and ought not to be extended farther. An act of bankruptcy in the eye of the law is considered as a crime; but where is the crime of denying oneself to another by previous consent and agreement?" Per Lord Mansfield C. J. in *Hooper v. Smith*, 1 Bl. R. 442. In *Barnford v. Baron*, 2 T. R. 595. n. this opinion of Lord Mansfield was recognized by the court.

In a case where it appeared that the creditor, to whom the denial was supposed to have been given by the plaintiff's clerk, had only demanded payment of a debt, but had not asked to see the plaintiff personally, and that the clerk, supposed to give the denial, had no specific directions for giving it, it was holden that such denial did not amount to an act of bankruptcy. *Dudley v. Vaughan*, 1 Camp. N. P. C. 271.

(16) S. P. Per Lee C. J. in *Jackman v. Nightingale*, Bull. N.

denied and is denied to a creditor, it is sufficient^a, although the object of the trader was to be denied to another creditor, and not to the person who called.

The denial must be to a creditor who has a debt due to demand^b; a denial to the holder of a security payable at a future day will not be sufficient, although the security be such as may by statute 7 Geo. 1. c. 31. § 1, 2. be proved under the commission.

But denial to the holder of a bill, on the morning of the day on which it becomes due, is sufficient.

A. being in bad circumstances^c on the evening of the 7th of January, expressed his fears to his clerk that he should not be able to pay a bill which would become payable the next day, and desired him to come earlier than usual the next morning, and be in the way, and in case the holder of that bill should inquire for him to deny him. The holder of the bill called the next morning before nine o'clock, and presented the bill for payment, when the clerk said, that his master was not at home. In the course of the day A. appeared in public, and before five o'clock in the evening paid the bill. The judge directed the jury to find for the plaintiff, conceiving that the act of bankruptcy was complete by the denial of a creditor with intent to delay him. Several of the jury suggested, that, by the practice of merchants, the payer of a bill has the whole of the day on which it becomes due, till five o'clock to pay it in. However, upon the judge's repeating to them his opinion, the jury found for the plaintiff. A motion was made for a new trial on the ground suggested by the jury, and a question was raised, whether the bill holder could be considered as a creditor till after the expiration of the time which, by the custom, the payer had to discharge it in; and it was contended also, that the creditor in this case, supposing him to be one then, could not be said to have been delayed, as he had been punctually paid in due time, and could not have protested the bill till after five o'clock. But the court approving the direction of the judge, refused to grant a rule.

^a Mucklow v. May, 1 Taunt. 479.
^b Ex parte Levi, 7 Vin. Abr. 61. pl. 14.

^c Colkett v. Freeman, 2 T. R. 59.

P. 40. and that therefore it was necessary to prove that the person denied was a creditor. Lord Camden C. J. held, that being denied to one who came on behalf of a creditor was not sufficient. Green's B. L. 39.

3. "*Or otherwise absenting himself.*"

If a person, who has not a constant dwelling, absent himself from his usual abode^x with design to defraud or delay his creditors, he shall be adjudged a bankrupt (17).

A trader having a counting house^y (the only place in which he carried on business) in town, and a dwelling house in the country, departed from his counting house, to which he never afterwards returned, taking his books with him, and slept at his dwelling house a few nights, after which he finally quitted that also: it was holden that the trader, having departed from his counting house without any intention of returning, began to absent himself from the time of such departure, within the meaning of this clause, and thereby committed an act of bankruptcy at that time.

If a trader leave his house in order to avoid his creditors^z, it will be an act of bankruptcy, although no creditor was thereby delayed.

See *Bateman v. Bailey*, post, Sect. IX. Evidence and Witnesses.

4, 5. Not any case of importance on these two members of this section in the statute.

^x Com. Dig. Bankrupt (C. 1.)

^y *Judine v. De Cousse*, 1 Bos. & Pul. N. R. 224.

^z *Hammond v. Hincks*, 5 Esp. N. P. C. 139. recognized in *Robertson v. Liddell*, B. R. E. 49 G. 3. 9 East, 487.

(17) On the 28th of November, Hall rode out of town and returned in the evening, before which a bailiff had been at his shop to arrest him*: the next morning he sent for the bailiff, and told him he went out in order to get the term of the plaintiff, and now the return of the writ was out, if they would take out a new writ he would give bail, which was done accordingly, and this was holden to be an act of bankruptcy within the statute 1 Jac. 1. c. 15. § 2.

A. being greatly indebted, gave orders that he should not be denied when his creditors called; several creditors called and A. saw them, and upon their asking for money he pretended to go out to get it, and left his house under that pretence, but did not return in the course of the evening. It was proved that during his absence he went either to the billiard table or a tavern. Lord Kenyon C. J. was of opinion that these were acts of bankruptcy, as absenting himself for the purpose of delaying his creditors. *Biggs v. Spooner*, 2 Esp. N. P. C. 651.

* *Maylin and another v. Eyloc*, London Sitings, Coram Raymond C. J. Str. 309.

6. "*Or yield himself to prison.*"

B. was arrested for 28th, and though he had money sufficient to pay the debt, yet chose rather to go to prison, in order, as he declared, to force his creditors to come to a composition. Lord Talbot C. held this an act of bankruptcy, but observed, that if there had not been an intention to delay creditors, yielding himself to prison would not constitute an act of bankruptcy.

7. "*Or willingly or fraudulently procure himself to be arrested, or his goods, money, or chattels, to be attached or sequestered.*"

It was said by Lord Mansfield C. J. in *Clavey v. Hayley*, Cowp. 428. that the word "attachment," being coupled with "arrests and sequestrations," (18) shewed that the legislature meant that sort of attachment by which suits are commenced, and that they plainly had in view the customs of London, and other towns, where that species of process is made use of. Hence where a person executes a bond and warrant of attorney to confess judgment, either for a *bonâ fide* debt^b, or for a larger sum than is really due^c, and judgment is entered up accordingly, and the debtor's goods taken in execution, such execution is not an "attachment," and consequently is not an act of bankruptcy, within the meaning of this clause.

8. "*Or depart from his dwelling house.*"

To constitute this an act of bankruptcy, the intention of the debtor to delay his creditor, by departing from his

Ex parte Barton, 7 Vin. Abr. Tit. b Harman v. Spottiswood, Co. B. L. Cred. and Bank. 61, 62. pl. 15. 5th edit. p. 100.

c Clavey v. Hayley, Cowp. 427.

(18) A sequestration in London is a method of proceeding in an action of debt, where the party cannot be found; in which case, upon the writ being entered, the officer goes to the warehouse of the defendant where the goods are, and fixes a padlock on the door, and if the defendant does not put in bail in time, judgment is given against him, and his goods are sold in satisfaction.

dwelling house, is sufficient^d (19). But if the departure be not accompanied with such intent, it is not an act of bankruptcy. Whether the departing from the dwelling house be accompanied with an intent to delay a creditor is a question of fact for the jury to decide upon all the circumstances.*

9. "*Or cause to be made any fraudulent grant or conveyance of his lands, tenements, goods, or chattels.*"

If a trader, in contemplation of bankruptcy, in order to pay even a just and *bona fide* creditor, or one who by possibility may become a creditor (viz. a surety^f) assigns by deed all^e, or even a part (20) of his effects to such creditor, the deed is fraudulent, and consequently an act of bank-

^d *Hammond v. Hincks*, 5 Esp. N. P. C. 139. *Robertson v. Liddell*, 9 East, 487: in which *Barnard v. Vaughan*, 6 T. R. 149. and *Fowler v. Padget*, 7 T. R. 509. as to construing the word "or" in this statute "and," were overruled.

^e *Aldridge v. Ireland*, B. R. E. 24 G. 3 cited in *Williams v. Nunn*, 1 Taunt 273.

^f *Hassels v. Simpson*, Doug. 28: n. ^g *Worseley v. Demattos*, 1 Burr. 467. *Wilson v. Day*, 2 Burr. 827.

(19) "If a trader leave his house, circumstances may shew that it was not for the purpose of absconding." Per Lord Mansfield C. J. in *Worseley v. Demattos*, 1 Burr. 467. In *Lingood v. Eade*, 1 Atk. 196. Willes C. J. was of opinion, that a person's absconding to avoid an attachment upon an award for the non-delivery of goods pursuant to the award, was not an act of bankruptcy; because it was not within the words of the statute, which makes it an act of bankruptcy in a person to depart from his dwelling house in order to avoid the payment of a just debt only, and not the delivery of goods [pursuant to an award], for that is a duty only. Lord Hardwicke Chr. declared that he thought the distinction taken by Willes, between absconding to avoid a debt and absconding to avoid a duty, a sound distinction, and well warranted by the words of the statute.

(20) It may be proper here to take notice of the case of *Hooper v. Smith*, 1 Bl. Rep. 442. where Lord Mansfield C. J. took a distinction between a conveyance executed by a trader of all his effects, and a conveyance of part of his effects, and relied on the cases of *Cock v. Goodfellow*, 10 Mod. 489. and *Small v. Oudley*, 2 P. Wms. 487. as establishing this proposition, viz. that a trader might give a preference to one creditor, by assigning to him a part only of his goods for the payment of part of his debt. It must be observed however, that this opinion, delivered by Lord Mansfield at Nisi Prius, can hardly be considered as an authority. First, because it is at variance with the sentiments expressed by his lordship on the same point, in delivering the judgment of the

ruptcy within the meaning of this clause¹. And the same rule holds if the assignment be to some creditors, but in total exclusion of others. If all the creditors do not concur, the deed is fraudulent and an act of bankruptcy¹.

Hence where a conveyance by deed was made by A. a trader², of *all* his effects, as a security to B., who had agreed to become A's banker, and to answer his drafts, for the purpose of enabling him to carry on his trade, subject to a defeasance on his paying such sums as B. might advance, with a covenant that on failure in the performance of the conditions, B. should take possession of the effects; the conveyance was holden to be fraudulent, and an act of bankruptcy, although the transaction, as between the parties, was fair and for a good and valuable consideration: 1st, on

¹ Ex parte Foord, cited by Lord Mansfield in 1 Burr. 477. Kettle v. Hammond, Middlesex Sittings after H. 7 Geo. 3. Bull. N. P. 40. i Eckhardt v. Wilson, 8 T. R. 140. k Worsley v. Demattos, 1 Burr. 467.

court in Worsley v. Demattos, 1 Burr. 478. The words of which report are these, "It has been argued, that after a resolution taken by a trader to commit an act of bankruptcy, the trader so resolving to become bankrupt, might lawfully prefer a just creditor, by conveying *part* of his effects to satisfy that creditor's debt. It is not necessary to determine that question in this cause, for here the conveyance is of *all*, and therefore *I will only say that no such proposition is yet established*, much less in the extent whereto it has been urged." From the language of this report then it may be collected that the impression on Lord Mansfield's mind at that time was, that the same point, which in Hooper v. Smith he considered as settled, was not then established; and it is clear that the cases of Cock v. Goodfellow, and Small v. Oudley, (which are the only cases mentioned by Lord Mansfield in Hooper v. Smith,) were fully within his contemplation when he delivered the opinion of the court in Worsley v. Demattos, because he has there stated those cases at great length.

2dly, If this point was not decided in Cock v. Goodfellow, and Small v. Oudley, it can hardly be considered as having been established in Hooper v. Smith, because, independently of that being a *vis prius* decision, there was another point made in the case, viz. whether there was not a concerted act of bankruptcy; and it is not quite clear from the report on which of these two points Lord Mansfield ultimately decided the case.

3dly, The opinion of Lord Mansfield in Hooper v. Smith is contradicted by subsequent decisions, viz. Devon v. Watts, B. R. Doug. 85. and Linton v. Bartlet, C. B. 3 Wils. 47. of which last case, though Lord Mansfield said, in Rust v. Cooper, Cowp. 632, 638. that it went further than any former case, yet he adds, that it was well and fully considered.

the ground of A's remaining in possession (21) after the execution of the deed, and thereby obtaining a false credit; and 2dly, on the ground of an undue preference having been given by the deed to B. contrary to the spirit of the bankrupt laws, which anxiously provide for an equal distribution of the estate of the bankrupt among all his creditors (22).

So, where a trader, being in distressed circumstances¹, executed a deed of assignment of *all* his estate to one of his creditors, purporting to be a security for an unliquidated sum, without delivering any kind of possession, except giving a letter of attorney to his own clerk (who had before this transaction managed his affairs,) to collect debts, &c. the assignment was holden fraudulent on the ground of undue preference, and there not being any alteration of possession (23).

A trader finding his circumstances on the decline², executed at midnight a bill of sale of *all* his goods (with the exception of a few articles to the amount of about 100*l*.) to some favourite creditors, in trust to pay them their full debts, leaving other debts to the amount of 900*l*. unprovided for, and absconded the next morning; the deed was holden fraudulent, for the interest which was excepted in the assignment was too minute to make a difference.

It is to be observed, that the circumstance of the trader being at the time of the conveyance under arrest at the suit of the creditor, to whom the conveyance is made, will not vary the case³.

In a case where a trader being in insolvent circumstances⁴,

¹ Wilson v. Day, 2 Burr. 397.

² Newton v. Chantler, 7 East, 138.

³ Compton v. Bedford, 1 Bl. R. 362.

⁴ Lintou v. Bartlet, 3 Wils. 47.

London Sittings after H. T. 1763.

Lord Mansfield C. J.

(21) The circumstance of the assignee of the effects not taking possession is only evidence of fraud, and consequently may be explained. Per Lord Mansfield C. J. 1 Burr. 484.

(22) The principle of all the cases is, that if the conveyance to a particular creditor *necessarily* prevents the property of the trader from being distributed as the law requires in cases of bankruptcy, that is itself an act of bankruptcy. Per Le Blanc J. in Newton v. Chantler, 7 East, 145.

(23) It is observable that in this and in the preceding case the deed was valid as between the parties, which circumstance was adverted to by Lord Mansfield in Wilson v. Day, where he said, that it was not necessary, that the deed should be fraudulent as between the parties; it was sufficient, if it was a fraud on the creditors generally.

in consideration of a loan of 120*l.* without interest, assigned one-third part of all his effects to the lender, who was his brother, and within two days after the execution of the deed, the trader absconded; it was holden, that the bill of sale was fraudulent; on the ground of its being made in contemplation of bankruptcy, and its being partial and unjust to other creditors.

So where a trader, in insolvent circumstances^r, having an act of bankruptcy in contemplation, and being threatened with an attachment for non-payment of money under a decree of the Court of Chancery, voluntarily by deed assigned a lease, *part* of his estate, to three of his creditors, (one of whom had lent him money, and the other had indorsed notes for him,) as a security for the payment of these debts, and then in trust for himself; the deed was holden an act of bankruptcy, 1st, As a fraud upon the creditor under the decree, who might have claimed the benefit of the lease, notwithstanding the assignment was for a valuable consideration, on the authority of *Twyne's case*; and 2ndly, As being a voluntary preference contrary to the general policy of the bankrupt laws.

Where a trader, being arrested for debt by one creditor^r, executed a bill of sale to another creditor (who had been induced to give a bond for his appearance at the return of the writ) of all his effects, for the purpose of paying, in the first instance, the debts due to both the creditors, and afterwards the overplus, if any, to himself; and the creditor, to whom the bill of sale was executed, took possession of the effects the day after the execution of the deed, on which day the trader committed an act of bankruptcy by keeping house: it was holden, that the execution of the bill of sale was an act of bankruptcy.

A trader, knowing himself to be in insolvent circumstances^r, and being under arrest in execution at the suit of a creditor, executed a bill of sale of *all* his goods to the creditor, for the purpose of paying his debt, with a reservation of the surplus to himself; it was holden that this assignment, although executed under the compulsion of an arrest was fraudulent, and an act of bankruptcy; the necessary consequence of the deed being to prevent the bankrupt from carrying on trade, and thereby operating as an injury to the other creditors.

^r *Deven v. Watts*, Doug. 85.

^q *Walker v. Kaste*, Doug. 294. See

Lawton v. Skinner, 2 Bl. R. 996.

^{which is not inserted, because the}

report was questioned in *Hassell v. Simpson*, Doug. 91, 92. n.

^r *Newton v. Chantler*, B. R. H. 16. G. 3. 7 East, 138.

It must be observed, that it is not competent to the persons who have signed the fraudulent deed, and are privies to the transaction, to set it up as an act of bankruptcy. But where a commission of bankruptcy was sued out on a fraudulent deed, upon the petition of a creditor who had not concurred in such deed, but who was chosen assignee, together with other creditors who had concurred and were privy to the fraud; it was holden, that it was not any objection to an action brought by them as assignees for the recovery of part of the bankrupt's estate, that some of the assignees had concurred in the fraudulent deed, the petitioning creditor not having so concurred.

A. having contracted with a canal company to build works on the canal, as their engineer, purchased, with money advanced by the company, timber and other articles for that purpose, which were deposited on the premises of the company. Being considerably indebted, he borrowed of the company a further sum of money to pay his creditors the full amount of their debts, and as a security executed a bill of sale of his effects, which were then lying on the premises of the company, and delivered them by the delivery of a copper halfpenny. It was insisted, that the bill of sale was fraudulent, because the possession remained to all appearances the same after as before the conveyance, and the bankrupt continued to gain a false credit as the owner of the goods; but the court held, that possession of the goods having been delivered to the company at the time of the execution of the bill of sale, *as far as possession under these circumstances could be given*, the deed was not fraudulent.

A surrender of a copyhold estate to a creditor, for the purpose of giving an undue preference, is not an act of bankruptcy, because the conveyance necessary to constitute an act of bankruptcy must be such as would defeat or delay creditors at law, and the copyhold not being liable either to a *fi. fa.* or *elegit*, a creditor could not have obtained possession of it, if it had not been surrendered.

It has not as yet been decided that, where the conveyance by the trader of his effects is not by deed, such conveyance, though fraudulent, is an act of bankruptcy. Indeed it has frequently been asserted that it is not; by Lord Mansfield C. J. and Aston J. in *Martin v. Pewtress*, 4 Burr. 2478. 2480. 2482. and in *Rust v. Cooper*, Cowp. 633. 635. But

^a *Bamford v. Baron*, 2 T. R. 594. n.

^t *Tappenden v. Burgess*, 4 East's R.

930. *Jackson v. Irwin*, 3 Camp. N.

P. C. 49.

^u *Manton v. Moore*, 7 T. R. 67.

^x *Ex parte Cockshott*, 3 Bro. Ch. C.

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such conveyance, though it does not amount to an act of bankruptcy, will be void by reason of the fraud. The leading cases on the subject are, *Alderson v. Temple*, 4 Burr. 2235.; *Martin v. Pewtress*, 4 Burr. 2477.; *Harman v. Fisher*, Cowp. 117.; and *Rust v. Cooper*, Cowp. 629. See also *Manton v. Moore*, 7 T. R. 71. where Lord Kenyon C. J. took this distinction: A conveyance of goods without deed is fraudulent, unless possession of the goods be given: if it be by deed, it is fraudulent, *and* an act of bankruptcy.

B. a bookseller, in September 1807, applied to the defendant, a pawnbroker, to discount three bills for him, which he had drawn upon C. and D. The defendant gave him cash for them; but soon after becoming suspicious of B.'s credit, he asked him, whether they were not accommodation bills: B. answered that they were. The defendant then required some security to be put into his hands, in case the bills should not be paid when they became due. In consequence of this application, B. at different times, between November and February, deposited with the defendant various parcels of books to the value of about 300*l.* for the purpose of being sold for his benefit, if the bills should not be duly honoured by the acceptors. These books were chiefly brought by B. in a hackney-coach in the evening. It likewise appeared that he had compounded with his creditors two or three years before, which circumstance must have been known to the defendant who had lent him money to pay the stipulated composition. B. committed an act of bankruptcy in the beginning of March, and the commission was sued out against him on the 17th of that month; the bills then remaining in the defendant's hands unsatisfied. It was contended on the part of the plaintiffs, that the defendant had unduly obtained possession of the books by a voluntary preference. *Lord Ellenborough*. "How is this a case of voluntary preference? The bankrupt parted with the books upon the defendant's importunity. The bills were not due, but the bankrupt was liable upon them, and the defendant had a right to ask for farther security. The defendant had not a right of action when the books were deposited with him; but the bills constituted a good petitioning creditor's debt, and might have afforded him the means of compulsion. Strictly, only the acts of a trader subsequent to his bankruptcy are void. Precedent acts supposed to be in contemplation of bankruptcy have likewise been invalidated; but this is an excrescence upon the bankrupt laws. The cases

upon the subject have gone far and far enough, and I am not disposed to give them any extension. If the debt had been due here, the preference certainly would not have been fraudulent. It wants *voluntariness* in which the fraud consists. The consideration upon which a payment made to an importunate creditor of a debt actually due has been allowed to be valid, has not been that he might resort to a suit to enforce payment, but that his demand repels the presumption that the bankrupt upon the eve of bankruptcy made a distinction among his creditors, and spontaneously favoured one of them to the prejudice of the rest. A demand of further security for a debt not yet due has the same effect; and in neither case is there any fraud upon the bankrupt laws, on which ground alone transactions previous to bankruptcy can be set aside." Plaintiffs nonsuited. On a motion to set aside the nonsuit the court were of opinion that the delivery of the goods did not constitute an act of voluntary preference, so as to render it fraudulent and void: that in order to constitute such voluntary preference, two things must concur; 1st. that the delivery should be voluntary on the part of the bankrupt; and, 2ndly, that at the time of such delivery, there should be a contemplation of bankruptcy. In the present case, the proposition for giving farther security came from the creditor and not from the bankrupt. *Hartshorn v. Slodden*, 2 Bos. & Pul. 582. was cited as in point.

Having stated the decisions which have been made upon the several acts of bankruptcy enumerated in the 13 Eliz. c. 7. § 1. and 1 Jac. 1. c. 15. § 2. I shall proceed to the consideration of such acts as are mentioned in the 21 Jac. 1. c. 19. § 2.

10. " *Obtaining either by himself, or others by his procurement, any protection other than such person as shall be lawfully protected by privilege of parliament.*"

Granting protections has fallen into disuse^z. According to Blackstone, the last instance which appears on our books is, a protection granted by King William in 1692^a. By stat. 7 Ann. c. 12. § 5. traders are declared not to be entitled to the protection given by that act to the servants of ambassadors and other public ministers.

^z 3 Bl. Comm. 289.

^a See *Barradale v. Ld. Cutts*, 3 Lev. 322.

11. *“ Exhibiting to the king, or any of his courts, any petition
 “ or bill against his creditors, to compel them to accept less
 “ than their just debts, or to procure time.*

These bills have been long exploded^b.

12. *“ Or, being arrested for debt, shall after his arrest lie in
 “ prison two months or more, upon that or any other arrest
 “ or detention in prison for debt, shall be adjudged a bank-
 “ rupt from the time of the first arrest.”*

The day on which the arrest is made is to be included in the reckoning^c; according to the rule, that, where the computation of time is to be made from an act done, as in this case from the arrest of the trader, the day when such act is done is to be included; and the months are lunar months. But if there is not a continuing imprisonment from the time of the arrest, then the intention of the legislature appears to have been that the two months should run only from the time of the party's going to prison, and not from the arrest. Hence where a trader was arrested for debt on the 4th of November^d, but allowed to go at large until the 8th, when he returned into custody, and being afterwards moved into the King's Bench prison, lay there upwards of two months, it was holden, that the act of bankruptcy which he thus committed, had reference only to the 8th when he returned into custody, and not to the 4th when the original arrest took place. So where a trader, being arrested, put in bail^e, and afterwards surrendered in discharge of his bail, and continued above two months in prison, it was holden, that he was a bankrupt only from the time of his surrender, not from the time of his arrest. But where sham bail was put in before a judge^f as a means to get the trader turned over to the prison of the court, and he was accordingly surrendered and sent there, it was holden that the imprisonment was to be computed from the arrest; there being an unbroken imprisonment from the time of the

^b Per North Ld. Keeper in Ald. Blackwell's case, 1 Vern. 153.

^c Ghazington v. Rawlins, 3 East's R. 407.

^d Barnard v. Palmer, 1 Camp. N. P. C. 509.

^e Tribe v. Webber, Willes, 464.

^f Rose v. Green, 1 Burr. 437. stated more fully post.

arrest, and the bailing being considered as a mere form to turn the bankrupt over from one custody to another.

Although the trader is, during two months, in a progressive course of committing an act of bankruptcy^g, yet the act of bankruptcy is not complete until the expiration of the two months, and consequently a commission cannot regularly issue until that time; for, in order to obtain it, there must be an affidavit that the party has committed an act of bankruptcy. The property of the bankrupt vests in the assignees by relation either from the time of the arrest^h or the going to prison, as the case may be.

13. "*Or being arrested for the sum of 100l. or more of just debt, shall, after such arrest, escape out of prison.*"

A. having been arrested for debt in Kent on the 31st of Marchⁱ, was, on the 6th of May following, brought up by an *habeas corpus*, in order to be turned over; on the road to the judges' chambers, A. was permitted to call at an house in the city of London, and was carried thence to a judge's chamber to be bailed, and accordingly was bailed, but instantly there surrendered by his bail in discharge of themselves, and thereupon committed to the King's Bench prison, where he lay above two months. It was adjudged, that this passing through another county, by the permission of the sheriff, was not an escape within the meaning of this act.

IV. *Of Property in the Possession of the Bankrupt as reputed Owner.*

By stat. 21 Jac. 1. c. 19. § 11. reciting, "that it often falls out that many persons, before they become bankrupts, convey their goods to other men upon good consideration, yet still keep the same, and are reputed the owners thereof, and dispose of the same as their own; it is enacted, "that if any person, at such time as he shall become bankrupt, shall, by the consent and permission of the true owner and proprietary, have in his possession, order, and disposition, any goods or chattels, whereof he shall be reputed owner, and

^g Gordon v. Wilkinson, 8 T. R. 507. ⁱ Rose v. Green, 1 Burr. 437.
^h King v. Leith, 2 T. R. 141.

“ take upon him the sale, alteration, or disposition, as owner,
 “ the commissioners shall have power to dispose and sell
 “ the same for the benefit of the creditors seeking relief un-
 “ der the commission, as fully as any other part of the estate
 “ of the bankrupt.”

It was formerly a question whether the preamble did not restrain the enacting part of this section^k, and confine its operation to property, originally belonging to the bankrupt, and remaining in his possession after a conveyance of it to another; but it was adjudged in *Mace v. Cadell*^l, Cowp. 232. and post p. , that it did not, and that it extended to the goods of other persons which are permitted to remain in the possession of the bankrupt, and whereof he may take upon himself the sale, alteration, or disposition as owner.

The general view of the provision now under consideration was to prevent traders from gaining a delusive credit, from a false appearance of their circumstances, to the misleading and deceit of those who should trade with them.

Choses in action fall within the description of goods and chattels mentioned in this clause^m.

Mortgages or sales upon condition of goods and chattels are within the statute, as well as absolute salesⁿ; and a mortgage by one partner to another of a moiety of stock in trade is not distinguishable from a mortgage to a stranger, if the mortgagor is suffered to continue in possession as visible partner.

The principal difficulty in deciding questions on this statute lies in ascertaining, whether the bankrupt is reputed owner or not. When this fact is settled, the application of the statute is easy; for from the reputed ownership false credit arises; from that false credit arises the mischief, and to that mischief the remedy of the statute applies.

As it has been truly observed, that these questions have much more of fact in them than law^o (24), I have ventured

^k Lord Hardwicke, in *Ryal v. Rolle*, 1 Atk. 182. was of opinion that the enacting part of the clause was restrained by the preamble.

^l *Horn v. Baker*, 9 East, 239. S. P.

^m *Ryal v. Rolle*, 1 Vesey, 348. 1 Atk. 165. S. C. 1 Wils. 260. S. C.

ⁿ Per Buller J. in *Walker v. Burdell*, Doug. 319. recognized by Lawrence J. in *Horn v. Baker*, 48 G. 2. B. R. 9 East, 241.

(24) Hence, in cases of this kind, it seems proper to leave it to the jury to say, whether under the circumstances, the bankrupt had the reputed ownership of the goods at the time. See the remark of Lawrence J. 9 East, 241.

to state the decisions at considerable length; lest I should mislead the reader, arranging them under two divisions; first, cases within the statute; and, secondly, cases not within the statute.

1. *Cases within the Statute, 21 Jac. 1. c. 19.*—A trader being indebted to J. S.^o, mortgaged to him certain leasehold estates and some hoys, but did not deliver possession of them, and afterwards the trader became a bankrupt. J. S. brought an ejectment and got possession of the leasehold estate, but the assignees took possession of the hoys. The leasehold not being sufficient to pay J. S. his principal and interest, he filed a bill to foreclose and to compel the assignees to redeem the hoys, or that they might be sold to pay his demands. The assignees admitting the leasehold not sufficient to pay J. S. insisted on their right to the hoys under this clause of the statute, the bankrupt having the possession, and acting as owner thereof until he was declared a bankrupt. Lord Talbot decreed, that the plaintiff should be at liberty to come in under the commission for his deficiency; dismissing the bill so far as it required account of the profits of the hoys, which were ordered to be sold for the benefit of the creditors in general. N. In *Hall v. Gurney*, Co. B. L. 5th edit. p. 342. Lord Mansfield C. J. said, that in this case of *Stevens v. Sole*, there was a grand bill of sale which was delivered to the mortgagee.

So where the owner of nineteen two-and-thirtieth parts of a ship^a, then lying at Yarmouth, conveyed an interest in the same to the defendant, by way of mortgage, and delivered to him the grand bill of sale, but continued in the management of the ship, together with the other part-owners, and acted as visible part-owner, from the time of the conveyance until he became a bankrupt; Lord Mansfield, on the authority of *Stevens v. Sole*, held that the defendant was not entitled to retain against the assignees. See *ex parte Standgroom*, Co. B. L. 1 Ves. jun. 163. and post.

So where A. a brewer^q, in partnership with B., mortgaged to C. in trust for B. his, viz. A.'s moiety of the utensils, stock in trade, debts, profits, &c. for securing a sum of money lent to him by B., but continued in possession of the stock, &c.; and received the debts as if in partnership with B., and afterwards became a bankrupt; it was holden by Lord Hardwicke Ch. assisted by Burnet J., Parker C. B.,

^a *Stephens v. Sole*, cited 1 Atk. 270.

^q *Hall v. Gurney*, Co. B. L. 5th edit. p. 342.

^q *Ryal v. Rolle*, 1 Vesey, 343. 1 Atk. 165. 1 Wils. 260.

and Lee C. J., 1st. On the authority of the preceding case, of *Stevens v. Sole*, that a conveyance of goods and chattels, by way of mortgage, or with condition of redemption, was within the statute, and that the mortgagee or vendee upon condition was "true owner and proprietor," within the meaning of that statute. 2dly, That "goods and chattels" included debts; and in this case notice of the assignment of the debts to the partner not having been given, the assignees of the bankrupt were entitled to dispose of them for the benefit of the creditors in general. 3dly, That the mortgage to C. in trust for B. the partner, was not to be distinguished from a mortgage to a stranger, under the circumstance of this case, the trustee not having interfered. That if it had been intended to take the case out of the statute, B. when he became entitled to A.'s moiety, should have had the sole and not a joint possession only; that A. having continued in possession after the conveyance as visible partner, and received debts, &c. by the permission of B., had the order and disposition of the goods and chattels, and was one of the reputed owners as much as B.

Another point was made, whether B., by the loan to A. his partner, did not gain a special lien on A.'s moiety of the partnership effects; but it was determined that he had not any such lien, there not being any authority or precedent for it after a bankruptcy; and that it was a different consideration what a court of equity might do between the parties themselves, while both remained capable of transacting for themselves.

It was agreed by the court, in the preceding case, that mortgages of lands and fixtures were not affected by the statute; and the same doctrine was laid down in *Horn v. Baker*, 9 East, 237. as to vats and stills belonging to a distillery, and which were fixed to the freehold.

In trover for a dier's plant, it appeared that the plaintiff had sold the plant to B. for which he gave the plaintiff two promissory notes, one payable in one year, and the other in two years from the time of the sale. At the expiration of the first year, B. finding it inconvenient to pay the note then due, by indenture agreed to assign and deliver the plant to plaintiff, in consideration of his delivering up the notes; but it was stipulated in the deed that A. should let the plant to B. for a term of years at a certain rent. B. covenanted to pay the rent quarterly, to keep the plant in repair, and not to assign it without the consent of the plaintiff. The deed

r 1 Verzey, 373. s Bryson v. Wylie, B. R. H. 23 G. 3. 1 Bos. & Pal. 63. n.

contained a proviso that B. should deliver the plant, and that the plaintiff might take possession of the same on failure in the payment of the rent. There was a memorandum, also, that B. had put the plaintiff into possession by the delivery of one winch in the name of the whole. Afterwards B. became a bankrupt, and the defendant being chosen assignee, took possession of the plant as part of the effects of B. The court were of opinion, that this case was within the statute, and Lord Mansfield said that he had not any doubt that this was a new experiment to defeat the bankrupt laws. The law had said, that a trader could not mortgage his effects and at the same time keep possession. What was the case here? the bankrupt sold and kept possession, and paid interest for the money; if this contrivance were suffered, it would open a door to avoid the statutes, and, therefore, it ought not to be allowed to prevail.

So where B. kept a coffee-house, and a creditor, after taking in execution all the household furniture and other articles belonging to the coffee-house, let them by deed to B. for a term of years; who covenanted not to remove them without the creditor's consent; B. having continued in possession under this deed for several years, until the time of his bankruptcy, the assignees were holden to be entitled to the property under this statute, the bankrupt having had such a possession as necessarily created a reputation of ownership. The bankrupt being the reputed owner and appearing to have the order and disposition of the goods, the court considered him as having taken upon himself the sale, order, and disposition, within the meaning of this statute, which terms they observed were only incidental to reputed ownership.

Trover for goods. It appeared that the defendants were bankers, to whom B., a mercer, resident in Cumberland, had given a warrant of attorney to secure certain advances which they had made to him. Judgment having been entered, a writ of *fi. fa.* was sued out thereon, and a warrant directed, on 7th May, to two of B.'s shopmen, there being no bound bailiffs in Cumberland. The shopmen were desired to take possession of all B.'s stock in trade under it. Having got the warrant they remained in the shop till night, when they locked it and carried away the key. But on the Monday morning they again opened it; and, although B. did not interfere, business was carried on apparently as usual. On the evening of this day, B. committed an act of bankruptcy. A

t In *Ryal v. Rolle*, 1 Atk.

u *Langham v. Biggs*, 1 Bos. & Pul. 32.

x *Jackson v. Irwin*, 2 Camp. N. P. C.

49.

commission of bankrupt was sued out against him on the 14th of the same month. The goods were afterwards sold by public auction under the warrant, the shopmen having remained in possession from the time it was delivered to them. *Ld. Ellenborough C. J.*—How can the possession of the servants be adverse to that of their master? The goods were certainly under the “order, disposition, and control” of the bankrupt, when the bankruptcy happened, and therefore passed to his assignees notwithstanding the execution. I remember an execution in the North, where the warrant was delivered to a gentleman’s butler who continued to serve up wine, and to wait at his master’s table as before. The court has more than once expressed an opinion that there ought to be bound bailiffs in Cumberland as in other counties. They seem to have supposed here, that a possession, *aliene* to the master’s, dissolved the relation between him and his servants; but they were wrong in point of law. Had they delivered the warrant on the 7th to a bound bailiff, and put him in possession, all would have been right.

A. a trader and an officer in the East India Company’s service^y, assigned his privilege of shipping goods from the East Indies to England to B. for a valuable consideration; and in order to evade the bye-laws of the East India Company, which prohibit such assignment, the goods were shipped, entered, warehoused, and sold by the Company in A.’s name, and the proceeds carried to his account; but before A. received those proceeds from the Company, he became a bankrupt. It was holden, that his assignees were entitled to recover the amount in an action for money had and received, against the Company, this being such a possession as fell within the statute.

It has already been observed that the enacting part of the 11th section of the statute 21 Jac. 1. c. 19. now under consideration, is not restrained by the preamble, but that it extends to the goods of other persons remaining in the possession of the bankrupt, as well as those which were originally the bankrupt’s property.

Hence, where it appeared that the plaintiff having kept a public-house^z, and had a licence, said she was married to one Penrice, whose name she afterwards entered in the books of the excise office, with a note in the margin, “married,” from which time Penrice had the licence, and continued in the possession of the house and goods until he committed an act of bankruptcy; the court were of opinion, that this case

^y *Gordon v. E. I. Company*, 7 T. R. 928. ^z *Mace v. Cadell*, Cowp. 232.

was within the statute, on two grounds; 1st. That the statute extended to the goods of other persons as well as to those which were originally the bankrupt's property. 2dly. That after a solemn declaration by the plaintiff that she was married to Penrice, and that these were the goods of Penrice in her right, she should never be allowed to say that she was not married to him, and that the goods were her sole property.

So where household furniture, the separate property of the wife of B.^a and of her children by a former husband, were, upon her marriage with B., assigned to the plaintiffs, as trustees, in trust to suffer B. to enjoy them, on condition that he should pay the plaintiffs, for the use of the children of his wife by her former husband, a certain sum by yearly instalments; and, notwithstanding several defaults in payment of those instalments, the bankrupt was permitted by the trustees to remain in the possession of those goods, until the evening before he committed an act of bankruptcy, when they repossessed themselves of the goods: it was holden, that the trustees had suffered the bankrupt to have the possession, order, and disposition of the goods, down to the time of his bankruptcy, and therefore the case fell within the very words, as well as the meaning, of the statute.

A., a termor for years of lands, had built thereon a rectifying distil-house^b, where he carried on the business of a distiller in partnership with B. A. finding it to be a losing concern, withdrew from the business, and thereupon leased to B. (his former partner) and one C. the premises, together with the *still*s, *vats*, and *utensils*, proper for carrying on the business, and which had been used by A. and B. Under this lease B. and C. continued in possession of the property, carrying on the trade in the same manner as was done before, until they became bankrupts. It did not appear that there was any usage in the trade for letting such utensils. The question arising, whether the bankrupts, under the above-mentioned circumstances, had the reputed ownership of the moveable utensils of the trade before and at the time of the bankruptcy, and had thereby acquired the real ownership by the statute for the benefit of their creditors; the court were of opinion that they had; Ld. Ellenborough C. J. observing, that "the true object of the statute was to make the *reputed* ownership of goods and chattels in the possession of bankrupts, at the time of their bankruptcy, the *real*

^a Darby and others v. Smith, 8 T. R. ^b Horn v. Baker, 9 East, 215.
92. cited in Jones v. Dwyer, B. R.
M. 52 G. 3.

ownership of such goods and chattels, and to subject them to all the debts of the bankrupt; considering that such reputed ownership would draw after it the real sale, order, alteration, and disposition of the goods. The stills, it appeared, were fixed to the freehold; and as such would not pass to the bankrupt's assignees, under the description of "goods and chattels" in the statute. But as to the vats and utensils, there was nothing in the case to rebut the reputed ownership following the possession of the bankrupts after the dissolution of the old firm, when the business was continued to be carried on by the bankrupts alone, in the same manner as it followed the possession of the antecedent partnership, when the trade was carried on by A. and B. If, as in some manufactories, where the engines necessary for carrying on the business are known to be let out to the several manufacturers employed upon them, there had been a known usage in this trade for distillers to rent or hire the vats and other articles used by them for the purpose of distilling, the possession and use of such articles would not in such a case have carried the reputed ownership. But in the absence of such an usage, there was nothing stated in the case which qualified the reputed ownership arising out of the possession and use of the things in their trade. The world would naturally give credit to the traders on their reputed property; and the person who permitted them to hold out to the world the appearance of their being the real owners, ought to be answerable for the consequences, and was so intended to be by the statute."

2. *Cases not within the statute.*—First, this clause does not relate to goods which the bankrupt has in *auter droit*, as executor (25) or administrator.

Hence, where a trader married a woman who was in possession of goods as administratrix to her former husband, and afterwards became a bankrupt, it was holden by Lord Hardwicke Ch. that this was not within the statute^c; because the administratrix had the goods in *auter droit*, and the husband could not have them in any better right, and therefore they were not liable to the debts of the second

^c *Ex parte Marsh*, 1 Atk. 159.

(25) "If an executor becomes bankrupt, the commissioners cannot seize the specific effects of his testator, not even in money which can specifically be distinguished, and ascertained to belong to such testator, and not to the bankrupt himself." Per Lord Mansfield, 3 Burr. 1366. See also *ex parte Ellis*, 1 Atk. 101.

husband; for the meaning of the statute (if it was possible to put any meaning upon some clauses of this statute which were very darkly penned) was only with regard to goods which the bankrupt had in his own right.

Or as factor or trustee.—A trader in London having money of J. S.^d (who resided in Holland) in his hands, bought South Sea stock, as factor for J. S. and took the stock in his own name, but entered it in his account book as bought for J. S. after which the trader became bankrupt, it was holden by Lord Parker, that this stock was not liable to the bankruptcy (26).

Goods in the possession of a factor^e, from the known nature of his employment, can *seldom* leave room for any question as to the purpose for which they are in his possession. But with respect to another species of property, namely, bills of exchange or notes, the possession of these is more equivocal; for being generally looked upon as cash, and delivered or remitted to an agent or banker generally in that way, and upon a general account between the parties they will be considered in that light; and, as being blended with the general mass of his property, will, in case of his becoming a bankrupt, pass by the assignment under the commission, *unless they appear to have been specifically appropriated to some particular purpose.*

It has been remarked with great propriety by Mr. Cullen, in his excellent treatise on the Principles of the Bankrupt

d *Ex parte Chien*, 3 P. Wms. 187. n. (A)

e Cullen's B. L. 225.

(26) Where a merchant consigns goods to a factor in London, who receives them, the factor, in this case being only a servant or agent for the merchant beyond sea, cannot have any property in such goods; neither will they be affected by his bankruptcy. Per Lord King Ch. in *Godfrey v. Furzo*, 3 P. Wms. 186.

“This statute does not extend to the case of factors or goldsmiths who have the possession of other men's goods merely as trustees, or under a bare authority, to sell for the use of their principal; but the goods must be such as the party suffers the trader to sell *as his own.*” Per Lord Mansfield delivering the opinion of the court in *Mace v. Cadell*, Cowp. 233. In *Horn v. Baker*, 9 East, 243. Lawrence J., commenting on the preceding passage, observed that the last expression, viz. “that the goods must be such as the party suffers the trader to sell as his own,” was evidently used in contradistinction to the case of factors, &c. who sold for other persons, and not for themselves. And he (Lord Mansfield) could not have meant to lay it down generally; for that, viz. the case of *Mace v. Cadell*, was not the case of a sale.

Law, that what will amount to a specific appropriation is a question of fact, and therefore depends upon the various circumstances of each particular case. From the following cases the reader will be able to form a general idea of the nature of a specific appropriation and its limits.

A correspondent of the bankrupt^f, before his bankruptcy, drew bills on him, and desired him to place them to a *particular account*, in the name of a third person, distinguished from their general account by a *particular letter*, and which the bankrupt said he would do. The correspondent also drew other bills on other persons *to answer the former bills*, and remitted the latter for that purpose to the bankrupt, with directions to place these *to the same account*. The former bills, not having been paid by the bankrupt, were sent back protested, and paid by the correspondent; and the latter bills, which had been remitted to answer them, remained at the time of the bankruptcy in the possession of the bankrupt unnegotiated. This was holden to be a specific appropriation.—See also *ex parte Oursell*, Amb. 297.

In a case of bills remitted to B. a banker^g, after an account transmitted by him to C. his correspondent, on the balance of which account C. was indebted for bills (accepted by B. and then outstanding) which C. had drawn upon B. under an agreement to make remittances to answer the same when due; the bills remitted to answer the acceptances (which were not paid by the banker, but by the correspondent himself after the bankruptcy of B.) were considered as in the nature of goods in the possession of a factor; and, therefore, that they belonged to the correspondent, subject to B. the banker's lien for the balance due to him at the time of the bankruptcy: and that, having been deposited by the bankrupt with another banker, who had set them short in the bankrupt's book, they were the same as if still in the possession of the bankrupt.

An agreement having been entered into by B.^h, a trader residing in London, to purchase of C. his correspondent at Manchester, all the light gold which should be sent by the latter from Manchester to London, and to accept bills at two months for the money due upon the sale, and to accept from time to time other bills drawn by C. for his own convenience, but that in such case C. should remit value to the amount of such acceptances, to answer together with the light gold for the different bills so drawn: B. became a

^f *Ex parte Dumas*, 2 Vez. 582. and ^h *Took v. Hollingworth*, 5 T. R. 215,
1 Atk. 232. S. C. in error, 2 H. Bl. 501.
^g *Zinck v. Walker*, Bl. R. 1154.

bankrupt; and C. being at the time of the bankruptcy considerably indebted upon the balance of the account, but ignorant of an act of bankruptcy committed, sent a quantity of light gold and some bills, in order to enable the bankrupt to pay his acceptances for him when they should become due. C. afterwards paid the amount of the bankrupt's acceptances for him to the holders, and claimed the gold and bills as against the assignees. There were no other accounts between the parties, but upon these dealings, which had been carried on in the manner stated for some years. This was held to be a specific appropriation, like the case of principal and factor, and the agreement was distinguished into different parts; of which, though the first was merely a contract for a bargain and sale, the latter part was considered as a contract, of which the effect was, that the bankrupt should become the banker of his correspondent and accept his bills, the latter remitting the value to the amount, in light gold and bills: and to which latter part of the contract, the other had no other relation than as incidentally ascertaining the rate at which the gold was to be taken.

The plaintiff, by letter, requested permission of B.¹ to place in his hands bills which had a long time to run, and to be allowed to draw without renewals at shorter dates, and desired B. to calculate the sum to be drawn for, allowing commission. The bills of long date, endorsed by the plaintiff, were included in this letter; to which B. returned an answer, saying, that agreeably to the plaintiff's wishes he had *discounted* the bills, and then specified the amount for which the plaintiff might draw upon him as desired. The plaintiff drew bills accordingly on B. who accepted the same, but shortly afterwards became a bankrupt, and these acceptances were dishonoured. The bills received from the plaintiff remained in the hands of B. at the time of the bankruptcy, unnegotiated; but the assignees of B. possessed themselves of these bills and received the amount of them. An action for money had and received having been brought by the plaintiff against the assignees, it was holden, that it would lie; for the application to the bankrupt was not to sell bills of long date for those of shorter date, but to *place* those long bills in the hands of the bankrupt upon condition of being allowed to draw short bills upon him; and, though in his answer he used the term *discount*, yet he assented to the terms of the first letter, and used that word merely as

a mode of ascertaining what he was to receive for the accommodation. The bills, therefore, having been deposited upon a condition, and that condition not having been complied with, and they remaining in specie in the hands of the bankrupt at the time of the bankruptcy, the plaintiff might have brought trover for them against the assignees, but they having parted with the bills and received the value, this action for money had and received would well lie in lieu of trover to recover the bills.

A. and B. were bankers in Birmingham^k, with whom the plaintiffs had opened a banking account, which was continued for some time, until A. and B. became bankrupts. A few days before the bankruptcy, the plaintiffs paid into the bank three bills, which were endorsed by them, but did not become due until a short time after the bankruptcy. At the time of the bankruptcy, a considerable balance was due to the plaintiffs upon their cash and bills (due) account, independently of the three bills in question. It was stated to be the practice of this and other banking-houses in the country, that when approved bills, not having a long time to run, were brought to them by a customer, they would enter them in a gross sum with cash, or paper which was immediately payable, to the credit of the customer, giving him either cash or liberty to draw upon them to that amount. And the bankers so far considered these running bills (which were always endorsed by the customer) as their own, that they would pay them away to their customers in the usual course of business, or transmit them to their own correspondents in London; and interest was charged on both sides the account on such paper transactions: and if the interest turned out to be against the customer, the bankers also charged a certain commission. Differing in this respect from the practice of bankers in London, who upon the receipt of undue bills from a customer, do not carry the amount directly to his credit, but enter them short; that is, note down the receipt of the bills in his account, with the amount, and the times when due, in a previous column of the same page; which sums when received are carried forward in the usual cash column. In the present case the assignees of the bankrupts, considering that the three bills in question had been entered in the bank books in common with cash, and that, by the usual mode of dealing, the plaintiffs might have drawn for the amount before the bills were due, refused to deliver them up to the

^k Giles and another v. Perkins and others, 9 East, 12.

plaintiffs on demand: and as they became due the assignees received the money from the acceptors, to the credit of the bankrupt's estate; for which the plaintiffs brought their action for money had and received. The court were of opinion, that the plaintiffs were entitled to recover; Ellenborough C. J. observing, that every person who pays bills not then due into the hands of his banker, places them there as in the hands of his agents, to obtain payment of them when due. If the banker discount the bill, or advance money upon the credit of it, that alters the case: he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance. The only difference between the practice stated of London and country bankers in this respect is, that the former, if over-drawn, has a lien on the bill deposited with him, though not endorsed; whereas the country banker who always takes the bill endorsed, has not only a lien upon it, if his account be over-drawn, but has also his legal remedy upon the bill by the endorsement; but neither of them can have any lien on such bills until their account be over-drawn; and here the balance of the cash account at the time of the bankruptcy was in favour of the plaintiffs.

It will be proper to remark¹, that, in order to make a specific appropriation of bills, there must be a lodging of a bill, for a bill; or at least, several bills deposited at once, as one entire transaction to answer some particular purpose; for, where A. and B. had a general running account, consisting of bills drawn by B. on C. in favour of A., and of bills and other negotiable securities deposited by A. with B., and upon the bankruptcy of B. and C., A. was obliged to take up the bills received by him from B., whereby the balance of accounts was in favour of A.; it was holden, that A. could not maintain trover for the bills deposited by him with B., because it appeared that they were paid in on a general running account, and there was not any specific appropriation of them. This case may appear to clash with the preceding, but it will be observed that the present case was a mutual exchange of securities, whereas the case of *Giles v. Perkins* was merely the case of a customer depositing bills with his banker.

A. B. C. and D. were partners in a banking house at Liverpool^m, and C. and D. also carried on a separate mercantile concern in London. J. S. having accepted bills payable at the house of C. and D. employed A. B. C. and D. to get

¹ *Bent v. Puller*, 5 T. R. 494.

^m *Bolton v. Puller*, 1 Bos. & Pul. 539.

them paid accordingly, and agreed to deposit with them good bills endorsed by him for the purpose of enabling them so to do; A. B. C. and D. debited J. S. in account for his acceptances, and credited him for all the bills which he deposited; some of the bills so deposited by J. S. were remitted by A. B. C. and D. to C. and D., upon the general account between the two houses, and before any of the acceptances of J. S. became due, both houses failed, and J. S. was obliged to pay his own acceptances; it was holden, 1st. that the assignees of C. and D. were entitled to retain against J. S. the bills remitted to them by A. B. C. and D.; held also, that it made no difference that one of the bills remitted did not arrive in London until after the bankruptcy of C. and D. though sent by A. B. C. and D. before the event.

The ground on which this decision proceeded, appears to have been this; that C. and D., notwithstanding their partnership with A. and B., were parties capable of acquiring a property in the bills in question, as capable as any third party; that they had acquired such property without reproach, and in truth in pursuance of that agreement upon which they were delivered to the banking-house; C. and D. were therefore to be considered as third persons with whom the bills had been negotiated (27).

Secondly, this statute does not extend to goods of which the bankrupt has merely a temporary custody (28).

As, where a trader having sold goods which were lying on a quay^a, it was agreed between him and the vendees, that the goods should be removed, and lodged in a warehouse until the vendees should give orders for the shipping the

^a *Ex parte Flynn*, 1 Atk. 185.

(27) If A. deposits bills endorsed in blank with B. his banker, to be received when due, and B. raises money upon them by pledging them with C. another banker, who is not acquainted with the circumstances under which the bills came into the hands of B., and afterwards B. becomes bankrupt; A. cannot maintain trover for the bills against C. *Collins v. Martin*, 1 Bos. & Pul. 648.

(28) "Contrary to the express words of the statute, factors have been excepted out of it for the sake of trade and merchandize." Per Lord Hardwicke Ch. in *ex parte Dumas*, 1 Atk. 234. 1 Ves. 685. "By the course of trade bankers and factors must have the goods of other people in their possession, and therefore this does not hold out a false credit to the world." Per Buller J. in *Bryson v. Wylie*, 1 Bos. & Pul. 84. n.

same off as opportunity offered, they having none at that time: and accordingly the trader caused the goods to be removed into a warehouse of his own for the purposes of this agreement. A few weeks after, the trader became a bankrupt, the goods still remaining in his warehouse. This was holden not to be within the statute: because it was a mere temporary custody of the goods, and it could not, with any propriety, be said that they were in the order, disposition, or power of the bankrupt.

Thirdly, the statute does not extend to those cases, where the property has been delivered to the vendee, as fully as the nature of such property will admit (29).

As where a trader having borrowed of the defendant a sum of money^o, gave him a bond for 1200*l.*, and on the same day, as a collateral security, assigned to him the bills of lading and policies of insurance of the cargo of a ship then at sea; the policies of insurance were endorsed to the defendant, but the bills of lading were not. The trader became a bankrupt, and a bill in equity was filed by the plaintiff, as his assignee for the goods, insisting on the circumstance of the defendant's not having been put in possession of them at the time. But Lord Hardwicke Ch. was clearly of opinion, that the defendant was entitled to retain possession of every thing until his debt was satisfied, because, every thing which could shew a right to the cargo being delivered over to the defendant, the bankrupt could no longer be said to have the order and disposition of it; and, therefore, the case did not fall within the meaning of this statute.

So where a trader^p, being indebted to the defendant, in consideration of the defendant advancing him a further sum, agreed to assign the cargo of a ship then homeward bound; of which he had received letters of advice, and to deposit the policy of insurance on the goods in the hands of the defendant, and, as soon as the bills of lading were transmitted to him, to endorse and deliver the same over to the defendant. The policy and letters of advice were deposited with the defendant accordingly, and the bill of lading was endorsed over to him as soon as it arrived, but not till after

^o *Brown v. Heathcote*, 1 Atk. 160.

^p *Lemprier v. Pasley*, 2 T. R. 485.

(29) See *Manton v. Moore*, 7 T. R. 67. and ante p. 185. which though not decided on this statute, affords an useful illustration of the principle here insisted on.

an act of bankruptcy committed by the trader. On the arrival of the ship the goods were delivered to the defendant. Trover having been brought by the assignees of the bankrupt, it was holden, that the preceding case of *Brown v. Heathcote* applied strongly to the present, and, although in that case there was an *assignment* of the bill of lading, and here only an *agreement* to assign, yet that did not make any difference, as neither conveyed more than an equitable title.

A ship at sea was mortgaged, with a proviso, that the mortgagor should continue in possession until failure of payment of mortgage money on demand, and at the time of the execution of the mortgage deed, the grand bill (30) of sale was delivered. The mortgagor became bankrupt. On the arrival of the ship, the mortgagee took possession of it, but the assignees took it from him and sold it; it was holden, that the mortgagee might maintain trover against the assignees, because, the ship being at sea at the time of the mortgage, the delivery of the grand bill of sale had sufficiently transferred the property.

So where A. on the 19th of August, having insured a ship (then lying at Dublin) for 12 months, the next day mortgaged it to B., and delivered to him all the deeds, &c. On the 14th of September following, the ship sailed for Cadiz; on the 18th of September B. mortgaged the ship to C., and in March following C. having notice of the arrival of the ship at Yarmouth, a few days after took possession of it. It was insisted on the part of the assignees of A., who had become a bankrupt, that B., under whom C. claimed, might have taken possession of the ship during the month the ship lay at Dublin; but it was holden, that the ship being in a foreign port, and the muniments having been delivered, there was a sufficient possession to take the case out of the statute, and that C. was entitled to the ship.

So where B. a trader deposited with A. a bill of sale of a sixteenth part of a ship, (not at sea) as security for money

q *Atkinson v. Maling*, 2 T. R. 462.

r *Ex parte Batson*, 3 Bro. Ch. C. 362.

Co. B. L. 5th edit. p. 345.

s *Ex parte Stadgroom*, 1 Vez. jun. 1634
and Co. B. L. 5th edit. p. 348.

(30) "It has been invariably holden, that the delivery of the grand bill of sale is equivalent to the delivery of the ship itself." Per Buller and Grose Justices, 2 T. R. 465, 466. N. The mortgage deed in this case was executed, before the stat. 26 G. 3, c. 60, was passed. See *Moss v. Charnock*, 2 East, 402.

lent by A., and it did not appear, that the trader had acted as owner from the time of the deposit; Thurlow Ch. held, that A. was entitled to the produce of the bill of sale against the assignees of B., who had become a bankrupt, because, in the case of assignments of shares of ships, this seemed to be the only way of delivering possession.

Fourthly, the statute does not apply to those cases where the bankrupt has possession of the goods for a special purpose only;

As where a bankrupt^a, after his certificate, and who traded again for himself, was left for several years in possession of his house, household goods and furniture; in order to assist in settling the affairs of the bankrupt estate, the assignees repeatedly stating the goods, &c. in their accounts with the creditors as part of the estate, it was holden, that such possession did not fall within the statute, so as to vest the goods in the assignees under a second commission, on the ground that the bankrupt had not the disposition so as to sell the goods, and that he was not the reputed owner. And Buller J. said, that possession of the goods exposed for sale in a shop might be within the statute; but possession of the furniture in a house was no more evidence of a right to that furniture, than of a right to the house. And per Ashhurst J. the statute certainly does not extend to every case of possession, not, for instance, to the case of a ready-furnished lodging.

So where trover being brought to recover the value of some timber^b, it appeared that the commissioners of the victualling-office, having occasion to erect a stage at Weevil, in Hampshire, for the purpose of rolling their barrels on board the shipping, published an advertisement for carpenters to deliver in proposals for doing the work. Forbes and his partners were disposed to undertake the business, and to deliver in their proposal; but, inasmuch as they were general merchants, and not carpenters, and as there might have been difficulties in making the contract in their own name, Kent, who was a carpenter, agreed with Forbes and Company, to make the contract in his name; and he was to have one-fourth of the clear profit, and a guinea a week for his superintendence, and Forbes and Company were to supply the timber, and to have the residue of the profits. The contract was accordingly made between the commissioners and Kent; and Forbes was one of Kent's sureties, which

^a Walker v. Burnell, Doug. 316. 3 T. R. 321. S. C.

^b Collins v. Forbes, 3 T. R. 316.

would not have been allowed (as Forbes knew) according to the usual mode of government contracts, had he been known to have had any concern in the contract, which Kent declared he had not. The timber was bought by Forbes and Company, and shipped by them in their own name, to be sent to the yard at Weevil, where it was delivered as for Kent's use, and received by the King's officers as such, and they swore they should not have received it on account of any other person; *but that they should not have permitted even Kent to dispose of it in any other manner than for the work contracted for, except such parts of it as were found unfit for the intended purpose, because they considered it as delivered for the purpose of the contract.* Kent had informed the agent-victualler, that Forbes was the real contractor, but that was a secret between those persons. Before the work was finished, Kent became a bankrupt, on which Forbes got possession of the timber, to recover which the present action was brought, on a supposition that the bankrupt's creditors were entitled to it, under the 21 Jac. 1. c. 19.

It was holden, that this case did not fall within the statute (31) on these grounds, that there never was any *sale* of the timber to Kent, nor any *general delivery so as to give him the absolute disposition of it*; for the storekeepers would not have permitted even Kent to have sold the timber to any other person, unless any part of it had been unfit to be used in performing the contract, as they considered that it was delivered only for the purpose of the contract. Therefore there could not be any danger that Kent's creditors would be induced to trust him on the credit of that property, or as supposing it liable to their debts; that the possession which he had was somewhat similar to that of a carpenter, who receives timber to convert it into a waggon; or of a taylor, to whom cloth is sent for the purpose of being worked up (32). And that it was a very different case

(31) " With regard to the case of *Collins v. Forbes*, I was by no means satisfied with the decision; it struck me, that when the timber was delivered to the officers of government in Kent's name, and for his use, he had the possession, and order, and disposition of it; but the court proceeded on this ground, that the bankrupt had possession of the goods for a *special purpose* only, and had not the order and disposition of them." Per Lawrence J. in *Gordon v. East India Company*, 7 T. R. 237.

(32) See the remarks of Mr. Cullen, tending to impeach the authority of *Collins v. Forbes*. *Principles of the Bankrupt Laws* by Cullen, p. 318. n. (106).

from that of a person making a sale of any part of his property, and yet continuing in possession and taking upon him the disposition of it with the consent of the vendee; for in such case as the *property was originally his*, and there never was any visible alteration in it, it was a snare to induce persons to give him credit, to which the vendee, by his neglect to obtain the possession, lends his assistance, as he concurs in giving a false appearance to the transaction. But in this case, the timber came into Kent's possession in the natural course of the transaction, in which there was not any fraud either actual or constructive; for it appeared by the evidence, that the timber was originally sold to the defendants on their own account, and that the vendor did not know that the bankrupt had any concern in the transaction.

Lastly, the possession which a husband*, living with his wife, has of the separate property of the wife, settled before marriage, in trustees for her separate use, is not sufficient to bring a case within the statutes; and it will not be any objection to such a settlement, that the goods were not described in the deed, or referred to in a schedule annexed. It is observable, however, that if stock in trade is thus settled on the wife, for the purpose of enabling her to carry on a separate trade, if the husband intermeddles such trade, the property will be liable to his debts.

V. Of Payments made to and by Bankrupts, protected by Statutes.

By the act of bankruptcy, all the real and personal estate of the bankrupt is vested in the assignees by relation, from the time of the act committed. The legal effect of an act of bankruptcy is to enable the assignees, when a commission is sued out, to rescind all contracts made by the bankrupt after the act of bankruptcy. This relation takes place in all cases except three, which are provided for by the statutes 1 Jac. 1. c. 15. s. 14.—21 Jac. 1. c. 19. s. 14.—and 19 G. 2. c. 32. s. 1.

Of Payments to Bankrupts protected by Statute.—By stat. 1 Jac. 1. c. 15. s. 14. it is provided, “that no debtor of the

* Jarman v. Woolloton, 3 T. R. 618.

“ bankrupt shall be endangered for the payment of his
 “ debt truly and *bonâ fide* to any such bankrupt before
 “ such time as he shall understand or know that he is be-
 “ come a bankrupt.”

Without this protecting provision, a *bonâ fide* payment made to a bankrupt, would not have prevented the assignees from recovering the same debt. It must be observed, that this provision does not extend to payments made voluntarily with knowledge of an act of bankruptcy^a, which is followed up by a commission. But where there has not been any commission, or any docquet struck^b, or any intention to sue out a commission, if a trader brings an action against his creditor for a debt due, it will not be any defence to say, that the plaintiff has committed an act of bankruptcy, of which the defendant had notice; for in such case, if the plaintiff recover, and the defendant pays the debt, the payment, having been enforced by coercion of law, will be valid against the assignees, in case any commission should afterwards be taken out.

A factor gave his acceptance to his principal^c for the amount of goods sold on account, after a secret act of bankruptcy of the principal, but without notice to the factor; and after notice of the bankruptcy the factor paid his acceptance to the holder of the bill; it was holden that the payment was protected by the statute.

By stat. 21 Jac. 1. c. 19. s. 14. “ no purchaser for a good
 “ and valuable consideration shall be impeached by virtue
 “ of this act or any other act theretofore made against bank-
 “ rupts, unless the commission to prove him a bankrupt be
 “ sued forth against such bankrupt within five years after
 “ he shall become a bankrupt.”

But by stat. 46 Geo. 3. c. 135. s. 1. [22d July, 1806,] it is enacted, “ That in all cases of commissions of bankrupt
 “ thereafter to be issued, all conveyances by, all *payments*
 “ by and to, and all contracts and other dealings and *trans-*
 “ actions (35) by and with any bankrupt, *bonâ fide* made or

^a Vernon v. Hankey, 2 T. R. 113.

^c Wilkins v. Casey, 7 T. R. 711.

^b Foster v. Allanson, 2. T. R. 479.

(35) Trover for goods. The goods in question were taken in execution by the defendants on the 7th of July last; and it was proved that the bankrupt had committed an act of bankruptcy in the May preceding, but that the commission was not sued out against him till the 1st of October following. The goods were

“ entered into more than two calendar months before the
 “ date of such commission, shall, notwithstanding any prior
 “ act of bankruptcy committed by such bankrupt, be good,
 “ provided the person so dealing with such bankrupt had
 “ not at the time of such conveyance, &c. notice of any
 “ prior act of bankruptcy having been committed by such
 “ bankrupt, or that he was insolvent, or had stopped pay-
 “ ment.” And by s. 2. “ In all cases of commissions of
 “ bankrupt thereafter to be issued, every person with whom
 “ the bankrupt shall have really and *bonâ fide* contracted
 “ any debt before the date and suing forth of such commis-
 “ sion, which, if contracted before any act of bankruptcy
 “ committed, might have been proved under such commis-
 “ sion, shall, notwithstanding any prior act of bankruptcy,
 “ be admitted to prove such debt, and to be a creditor under
 “ such commission, in like manner as if no such prior act of
 “ bankruptcy had been committed, provided such creditor
 “ had not, at the time of the debt being contracted, notice of
 “ any prior act of bankruptcy.” And by s. 3. “ in all cases
 “ in which, under commissions of bankrupt thereafter to be
 “ issued, it shall appear that there has been mutual credit
 “ given by the bankrupt and any other person, or mutual
 “ debts between the bankrupt and any other person; one
 “ debt or demand may be set off against another, notwith-
 “ standing any prior act of bankruptcy committed by such
 “ bankrupt before the credit was given to, or the debt was
 “ contracted by such bankrupt, in like manner as if no such
 “ prior act of bankruptcy had been committed; provided
 “ such credit was given to the bankrupt two calendar
 “ months before the date and suing forth of such commis-
 “ sion, and provided the person claiming the benefit of such
 “ set-off had not at the time of giving such credit notice of
 “ any prior act of bankruptcy, or that such bankrupt was

sold on the 20th of July, and on the 30th of the same month the
 money was paid over to the person at whose suit they were taken
 in execution. For the defendants, it was contended, that this case
 was within this section; but per Lord Ellenborough C. J. “ There
 is no pretence for calling this a payment by the bankrupt, and the
 meaning of the word *transactions* must be determined by the words
 used along with it, viz. “ contracts and other dealings.” The
 transactions protected by this clause of the statute are evidently
 transactions between the parties in the ordinary course of business,
 not transactions carried on through the medium of legal process.”
 The plaintiffs had a verdict for the produce of the goods allowing
 for the expenses of the sale, but not for the sheriff’s poundage.
 Blogg v. Phillips, 2 Camp. N. P. C. 129.

“ insolvent or, had stopped payment:” And by the same section it is provided, “ that the issuing of a commission, although it shall afterwards be superseded, or *the striking of a docket for the purpose of issuing a commission, whether any commission shall have actually issued thereupon or not, shall be deemed notice^d of a prior act of bankruptcy for the purposes of this act, if it shall appear that an act of bankruptcy had been actually committed at the time of issuing such commission or striking such docket.*” And by s. 4. “ All persons against whom any commission of bankrupt shall thereafter issue, and who shall be duly found bankrupts under the same, shall, upon obtaining their certificate, be discharged from all debts by this act made proveable under such commission, and shall have the benefit of the several statutes now in force against bankrupts, in like manner as if such secret acts of bankruptcy had not been committed prior to the contracting such debts.” And by s. 5. “ No commission of bankrupt, thereafter issued, shall be avoided by reason of any act of bankruptcy having been committed, by the person against whom such commission shall have issued, prior to the contracting the debt of the creditor, upon whose petition such commission shall have issued, if such petitioning creditor had not any notice of such act of bankruptcy at the time when the debt to him was contracted.”

Notwithstanding this last section, it is still necessary, in order to support a commission of bankrupt^e, that there should have been a good petitioning creditor's debt subsisting when the act of bankruptcy was committed; and it is not sufficient that the petitioning creditor's debt accrued before the suing out of the commission.

By stat. 49 G. 3. c. 121. (20th June, 1809,) s. 2. it is enacted, “ that in all cases of commissions of bankrupt hereafter to be issued, all executions and attachments against the lands and tenements, or goods and chattels of the bankrupt, *bonâ fide* executed or levied more than two calendar months before the date and issuing of such commission, shall be valid and effectual, notwithstanding any prior act of bankruptcy committed by such bankrupt, in like manner as if no such prior act of bankruptcy had been committed; provided the person, at whose suit such execution or attachment shall have issued, had not at the time of

^d Not proof. *R. v. Bullock*, 1 Taunton's R. 71. This member of the clause, which declares that striking a docket shall be notice of a prior

act of bankruptcy, has been repealed by stat. 49 G. 3. c. 121. s. 1.

^e *Moss v. Smith*, 1 Camp. N. P. C. 434.

“ executing or levying the same any notice of any prior act
 “ of bankruptcy by such bankrupt committed, or that he
 “ was insolvent, or had stopped payment. Provided al-
 “ ways, that the issuing of a commission of bankrupt, al-
 “ though such commission shall afterwards be superseded,
 “ shall be deemed such notice, if it should appear that an
 “ act of bankruptcy had been actually committed at the
 “ time of issuing such commission.”

Of Payments by Bankrupts protected by Statute.—The next object of consideration is the stat. 19 Geo. 2. c. 32. s. 1. Before this statute, when an act of bankruptcy had been committed, and a commission had issued in consequence of it, the property of the bankrupt was by relation to the act of bankruptcy so vested in the assignees, that any payment made by the bankrupt after the act of bankruptcy, was void as against creditors, however fairly such payment might have been made, and without any regard to its being a voluntary or compulsory payment. In order to avoid the inconveniencies arising from too rigid an observance of this principle, when trade became more extensive, the stat. 19 G. 2. was made, whereby, after reciting the frequent commission of secret acts of bankruptcy, unknown to creditors, and other persons with whom the bankrupts had dealings in trade, and their continuing afterwards to appear publicly and carry on their trade by buying and selling, drawing, accepting, and negotiating bills, and paying and receiving money on account thereof, in the usual way of trade, and in the same open and public manner as if they were solvent persons, and further reciting the discouragement to trade and prejudice to credit, from permitting payments to be defeated in the cases and under the circumstances above-mentioned, it is enacted, “ that no real and *bonâ fide* creditor
 “ of any bankrupt, for or in respect of goods really and *bonâ*
 “ *fide* sold to such bankrupt, or for or in respect of any bills
 “ of exchange really and *bonâ fide* drawn, negotiated, or ac-
 “ cepted by such bankrupt, in the usual and ordinary course
 “ of trade and dealing, shall be liable to repay to the as-
 “ signees of such bankrupt’s estate, any money which before
 “ the suing forth such commission was really and *bonâ fide*,
 “ and in the *usual and ordinary course of trade and dealing*†,

† Money received in respect of bills of exchange not yet due cannot be considered as received by the creditor in the usual and ordinary course of trade and dealing. The payments protected are payments upon bills actually due. *Tamplin v. Diggins*, 2 Camp. N. P. C. 312. Semb. that accommodation bills are not bills which can be said to have been drawn in the usual course of trade and dealing within the meaning of this statute. S. C.

“received by such person of any such bankrupt, before
 “such time as the person receiving the same shall know, un-
 “derstand, or have notice, that he is become a bankrupt, or
 “that he is in insolvent circumstances (34).”

A payment under an arrest^s, has been construed to be a payment in the usual and ordinary course of trade and dealing, and consequently within the protection of this act.

The bankrupt was indebted to Morgan by the acceptance of a bill of exchange. The bill not being paid, M. commenced an action against the bankrupt, and employed a sheriff's officer to arrest him. The bankrupt upon being arrested, paid the amount of the bill. Neither M. nor any one concerned for him personally knew that the bankrupt had committed an act of bankruptcy, or that he was in insolvent circumstances. The majority of the judges in the Court of Common Pleas, viz. Heath and Rooke J. held this a good payment within the statute. Chambre J. thought otherwise (35).

g *Cox v. Morgan*, 2 Bos. & Pul. 393. Per Heath and Rooke Js., Chambre J. dissent. See also the cases there cited of *Calvert v. Lingard*, and *Holmes v. Wennington*, establishing the same point.

(34) Different opinions have been entertained in respect of the manner of construing this statute. It was said by Chambre J. in *Cox v. Morgan*, 2 Bos. & Pul. 407, that as all the other bankrupt laws are remedial, and as the act in question, by giving a preference to a particular class of creditors, trenches upon the great leading principle of those laws, viz. the securing the property for equal distribution, therefore it was not peculiarly entitled to have its operation extended by construction. But in the same case, p. 412. Heath J. is reported to have said; that this had always been considered as a remedial statute, and as such was entitled to a liberal construction. So Lord Kenyon C. J. in *Bradley v. Clark*, 8 T. R. 200. said, that it was a remedial law, and that effect ought to be given to it as far as the words would warrant. See *Ellenborough C. J. in Hovil v. Browning*, 7 East, 154.

(35) In *Harwood v. Lomas*, 11 East, 127. the question arose whether a payment of a promissory note by a bankrupt, under an apprehension of process of execution issuing against him, upon judgment obtained on the note, was a payment in the usual and ordinary course of trade and dealing within the statute. The court inclined to think that it was not, but did not give any decisive opinion on this point, holding the payment not to be protected, on the ground, that it did not appear in the special case, that the note (even supposing it to be comprehended under the term bill of ex-

But where the bankrupt being in prison^h, sent for a certain number of his creditors and paid them, omitting one, at whose suit also he was charged in custody; this was holden to be a case of undue preference, and the payment thus made not within the protection of the statute.

A bill of exchange had been drawn on the bankruptⁱ, who, when it became due, requested time of the holder (the defendant Hall) saying, it was not convenient to pay it at that time, but promising to pay interest for it, if the defendant would permit it to remain in his (the bankrupt's) hands, and afterwards, without notice of the bankruptcy, the defendant on application received payment of the bill: the court were clearly of opinion, that this was not such a payment in the ordinary course of business as came within the provision of the statute, on the ground, that the transaction amounted to a loan of money at interest, which became a debt.

So where money had been paid by a trader^k, after a secret act of bankruptcy, to a carrier, for the carriage of the trader's goods, it was holden, that the payment was not within the statute, which was confined to payments made for goods, and payments of bills of exchange.

So where A. obtained a verdict for a sum of money against B.^l, who afterwards committed an act of bankruptcy; A. instead of entering up judgment and taking out execution, consented to take a bill for the amount, drawn by B. on C. his debtor, which bill, when it became due, was duly paid by C., it was holden, that this payment was not protected by the statute.

A trader, after a secret act of bankruptcy^m, consigned goods to a factor, who agreed to advance money thereon, and accordingly accepted and paid bills drawn on him by the trader; a commission afterwards issued against the trader, after which the factor sold the goods and received the money; it was holden, that this case did not fall within

^h Southey v. Butler, 3 Bos. & Pul. 237.

ⁱ Vernon and others assignees of Tyler v. Hall, 9. T. R. 648.

^k Bradley v. Clark, 5 T. R. 197.

^l Pinkerton v. Marshall, 9 H. Bl. 334.

^m Copland v. Stein, 8 T. R. 199.

change in the statute) had been drawn and negotiated in the usual and ordinary course of trade and dealing. It seems, that whether the note had been so drawn, &c. was a question of fact which the jury ought to have found.

the provisions either of the 1 Jac. 1. c. 15. s. 14. or the 19 G. 2. c. 32. s. 1. and that the factor was answerable to the assignees for the value of the goods.

A trader, being indebted to A. for goods sold and delivered, committed a secret act of bankruptcy^a; after which A. without the knowledge of the bankrupt, by the custom of London, attached money belonging to the bankrupt in the hands of his debtor, and received the same from the debtor in consequence of a judgment obtained against him in the foreign attachment. It did not appear, that the bankrupt knew that this money was in the hands of his debtor: it was holden, that this payment *by the debtor* was not protected by stat. 19 G. 2. c. 32. for that statute extends only to payments *by the bankrupt*.

VI. Of Actions which may be brought by the Assignees of a Bankrupt, and in what Manner they ought to sue.

1. Money had and received.—An action for money had and received will lie against a creditor of the bankrupt^a, who after the act of bankruptcy, takes out execution against the goods of the bankrupt, and receives from the sheriff the money arising from the sale of the goods; for the law supposes the creditor to have received the same for the use of the assignees, in whom the property of the goods is vested, and thence implies a promise to pay.

So where a trader became a bankrupt by lying in prison two months after an arrest^b, it was holden, that his assignees might maintain an action for money had and received against a person, who, after the arrest, and before the expiration of the two months, having had notice that a commission would be sued out against the trader, sold his goods, and paid him the produce (36).

^a *Hovil v. Browning*, B. R. H. 46 G. 3. 7 East, 154. ^b *Kitchin v. Campbell*, 3 Wils. 304. and Bl. Rep. 827.

^p *King v. Leith*, 2 T. R. 141.

(36) In cases of this kind the assignees have an election to bring either trover or assumpsit. In trover they may recover the full value of the goods at the time they were taken, though the sale may not actually have produced more than half their worth; but

By the law of England^q, if not contradicted by the laws of the country where the property may be, the commissioners may dispose of the personal property of the bankrupt resident here, although such property be in a foreign country. Hence where the defendant being resident in England, and a creditor of the bankrupt in England, after the assignment of the bankrupt's estate, and with full knowledge thereof, attached and afterwards received, by a remittance, money due to the bankrupt in Rhode Island in North America; it was holden, that the assignees might recover the same from the defendant, in an action for money had and received to their use.

So where after an act of bankruptcy committed^r, but before the assignment, a creditor of the bankrupt in England, and resident in England, with knowledge of the act of bankruptcy, made an affidavit of debt in England, by virtue of which he attached, and after the assignment received, money due to the bankrupt in one of the British plantations in America; it was holden, that the assignees might recover the same in an action for money had and received.

A. after an act of bankruptcy committed by B.^s, received the amount of a draft drawn by B. on his banker in favour of A., for a *bond fide* debt. The plaintiffs, as assignees of B., brought an action^t against the banker for a larger sum of money belonging to the bankrupt, in which action the banker attempted to set off the beforementioned sum, which he had paid to A.: but it appearing that the banker had paid the money to A. with full knowledge of the bankruptcy, the set-off was disallowed. The plaintiffs then brought an action for money had and received against A. to recover the

^q *Hunter v. Potts*, B. R. H. 31 Geo. 3. ^s *Vernon v. Hanson*, 2 T. R. 287.

⁴ T. R. 182. (37).

^t *Vernon v. Hankey*, 2 T. R. 118.

^r *Sill v. Worwick*, 1 H. Bl. 665.

in assumpsit, the assignees considering the party selling the goods as their agent, are entitled to recover only what was produced by the sale of the goods. Per Grose and Buller Js. in *King v. Leith*, 2 T. R. 144, 145. If the assignees bring assumpsit they affirm the contract, and the defendant, if a creditor of the bankrupt, may set off his debt, *Smith v. Hodson*, 4 T. R. 211. But the assignees cannot affirm the act of the bankrupt as their agent in part, and avoid it as to the rest, *Wilson v. Poulter*, Str. 859.

(37) The authority of this case was confirmed by the decision in *Phillips v. Hunter*, on error in Exchequer Chamber, Hil. 35, Geo. 3. Eyre C. J. dissentient, 2 H. Bl. 402.

amount of the draft, but it was holden, that the action would not lie; for, although the plaintiffs had at first an election whether they would bring the action against the banker or A., yet having in the former action, against the banker, insisted that the money had not been paid on their account, and that it was void, they could not in the present action be permitted to contradict it, and insist that the payment was made on their account.

Covenant.—In covenant for rent on an indenture^a brought by the assignees of the lessor (a bankrupt) the lessee cannot plead that the lessor *nil habuit in tenementis*; for the assignees succeed to all the rights of the bankrupt, and consequently may claim the benefit of that estoppel, which would have operated between the lessor and lessee.

Debt.—The assignees of a bankrupt may bring an action of debt on the stat. 9 Ann, c. 14. against the winner^x for money lost at play by the bankrupt before his bankruptcy.

Trover.—If after an act of bankruptcy but before commission, a person sue out execution against the goods of the bankrupt, under which the sheriff makes a seizure, and then a commission issues, and afterwards the sheriff sells the goods, the assignees may maintain trover against the sheriff^y, but not trespass^z, for officers and ministers of justice cannot be made trespassers by relation.

In like manner the assignees may bring trover against the party suing^a, if proved a party to the conversion by giving bond to the sheriff, and receiving the money levied (38).

Or if the party accompany the officer in levying the goods^b, though the produce of the goods remain in the hands of the sheriff's broker.

If a trader become a bankrupt between the time of executing a bill of sale of a ship at sea to the defendant^c, and the time of the defendant's complying with the requisites of the registry acts of the 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68. § 16. though such requisites were completed after the act of bankruptcy, and before the action brought, yet

^u Parker v. Manning, 7 T. R. 537.

^x Brandon v. Pate, 2 H. Bl. 368.

^y Cooper v. Chitty, 1 Burr. 20, and 1 Bl. Rep. 65.

^z Smith v. Milles, 1 T. R. 475.

^a Rush v. Baker, Bull N. P. 41. Str. 996, and MSS. S. C.

^b Menham v. Edmonson, 1 Bos. & Pul. 369.

^c Moss v. Charnock, 2 East's R. 999.

(38) "As to the conversion by the defendant, the evidence is as strong as can be; the bond proves that he ordered the execution, and the money paid to him shews who had the produce of the goods." Per Cur. S. C. MSS.

the property does not pass, and the assignees may maintain trover for the ship.

If a trader has been a bankrupt twice^d, and obtained his certificate under both commissions, but has not paid a dividend of 15s. in the pound under the last; although the future estate of such bankrupt remain liable to the claims of his individual creditors, under the second commission, not having received 15s. in the pound, which they may respectively sue for as in other cases, yet this will not prevent the vesting of the bankrupt's estate in the assignees under a third commission for the benefit of all the creditors, and such assignees may sue for and recover the same.

In what Manner the Assignees ought to sue.—In actions brought by the assignees, they may declare generally as assignees of the estate of A. a bankrupt, according to the form of the statutes concerning bankrupts, without setting forth the act by which the trader became a bankrupt^e, or the proceedings under the commission^f.

A new assignee may in his own name maintain an action upon a judgment^g, obtained by a former assignee, who has been displaced by the chancellor.

A declaration on a *scire facias*^h, by the assignees of a bankrupt, stating generally, that he became a bankrupt within the meaning of the statutes, and that his goods and effects were duly assigned to the plaintiffs, is sufficient, without stating the trading, act of bankruptcy, &c. because a *scire facias* is an action.

The assignees cannot make themselves parties to the record in any intermediate stage of the proceedingsⁱ, but it must be immediately after judgment, and before any other proceeding has taken place, though an interlocutory judgment is sufficient for this purpose. Hence where plaintiff after judgment against him *and* writ of error allowed, becomes a bankrupt, the assignees ought to go on with the writ of error in the bankrupt's name, the writ of error being a proceeding after the judgment; and if the assignees, instead of adopting this method, sue out a *sci. fa.* in their own names to compel an assignment of errors, the court will quash it.

If the assignees bring an action upon a contract made by the bankrupt before his bankruptcy, it is incumbent on

^d *Hovil v. Browning*, 7 East, 154.

^e *Pepys v. Low*, Carth. 99.

^f *Lawson v. Lamb*, Latw. 274.

^g *De Cosson v. Vaughan*, 10 East, 61.

^h *Winter v. Kretchman*, 2 T. R. 45.

ⁱ *Kretchman v. Beyer*, 1 T. R. 463.

them to sue as assignees, and so to state themselves in the declaration.

But where the contract is made by the bankrupt after his bankruptcy^k, and before he has obtained his certificate, as all his property is then vested in the assignees, he will be considered as their agent; and in such case it is not necessary that they should state themselves to be assignees in the declaration (39), in like manner as where an executor brings an action on a contract made *by himself* respecting the goods of the testator, he need not name himself executor.

In actions of assumpsit brought by the assignees on contracts made with the bankrupt, there are two ways in which the promises may be laid in the declaration; 1st, As having been made to the bankrupt^l before his bankruptcy (40); and, 2dly, As having been made to the plaintiffs as assignees^m.

In an action brought by the assignees of a bankruptⁿ, the plaintiff declared on an account stated *with the bankrupt*, whereon the defendant was found in arrear *l.*, and being so in arrear, he promised to pay the plaintiffs as assignees. On the general issue pleaded, the evidence was, that the account was stated with the bankrupt, and the defendant promised to pay him, but there was not any evidence of a promise to the assignees. Lord Hardwicke C. J. was of opinion, that the declaration was supported by the evidence, and the plaintiff had a verdict. On a motion for a new trial, the court concurred in opinion with the chief justice; Lee J. observing, that he was not aware of any case, where, on a declaration framed in this manner, it had been holden necessary to prove an express promise to the assignees; because when the account was proved to be stated with the bank-

^k *Evans v. Mann*, Cowp. 569.

^l *Rig v. Wilmer*, Str. 697. adjudged on demurrer to declaration.

^m *Fashion v. Dermot*, 7 Vin. Abr. 140.

Tit. Creditor and Bankrupt, pl. 16.

ⁿ *Skinner v. Rebow*, T. 8 & 9 G. 2. B. R. MSS.

(39) "Nor is it necessary that the assignees should give evidence of the trading, act of bankruptcy, &c." Per Ashhurst J. in *Evans v. Mann*, Cowp. 570.

(40) It is most usual in practice to state the promises to have been made to the bankrupt, and this form is best adapted to actions on promissory notes given to the bankrupt. Sometimes to declarations drawn in this form, where the fact requires it, counts are added for money had and received to the use of the assignees, and upon an account stated with the assignees, with promises to the assignees.

rupt, there was a sufficient consideration; a debt was created to the bankrupt which was transferred to the assignees by the statute; and this was evidence of a promise to the assignees so as to entitle them to this demand, standing in the place of the bankrupt.

The plaintiffs, in their original writ, described themselves as assignees of A.^o, and also as assignees of B., there not being any joint commission against the two, and declared in several counts for goods sold and delivered *by both the bankrupts, and also for goods sold by each of the bankrupts*. A verdict was found for the plaintiffs, and the damages were assessed severally on the separate counts. On a motion in arrest of judgment, the court were of opinion that the assignees might recover as much as the bankrupts themselves might jointly have recovered; therefore as the damages were assessed severally, they might enter up their judgment on the count for the joint demand (41).

Agreeably to this determination, where the plaintiffs sued^o as assignees of A. and B., and also as assignees of C., for a joint demand due to all the bankrupts, the declaration was holden good on motion in arrest of judgment.

Actions against Assignees.—Formerly when a dividend was declared, it was considered that a right of action against the assignees accrued to every creditor for his proportion^o, and it was holden that assumpsit might be maintained against the assignees of a bankrupt by a creditor for his share of a dividend, under an order of the commissioners (42); and in such action the proceedings before the commissioners were conclusive evidence of the debt (43), and the assignees could not set off a debt due from the plaintiff, for the sum proved

^o Hancock v. Haywood, 3 T. R. 433. p Streatfield v. Halliday, 3 T. R. 779.
recognized by Ld. Ellenborough q Brown v. Bullen, Doug. 407. per
C. J. in De Cosson v. Vaughan, 10 Kenyon C. J. 6 T. R. 549. S. P.
East, 65.

(41) If the verdict had been entered generally, the judgment must have been arrested; because the court were clearly of opinion that the counts for the separate demands were improperly joined.

(42) After a debt is liquidated before the commissioners, it cannot be litigated, but by an application to the great seal. Per Cur. Doug. 409.

(43) The only way to question the proof of the debt taken by the commissioners is by petition to the chancellor. Per Lord Mansfield C. J. Doug. 408.

must be taken to be the balance due; but now, by stat. 49 G. 3. c. 121. s. 12. no action shall be brought by any creditor who has proved any debt under any commission of bankrupt, against the assignees of the estate of such bankrupt, for the amount of any dividend declared by the commissioners: but in cases of refusal by the assignees to pay such dividend, the creditor entitled to the same may petition the Ld. Chancellor, Ld. Keeper, or Lords Commissioners for the custody of the Great Seal, who, on hearing such petition, may not only order the payment of such dividend, but also in all cases in which it shall appear that the justice of the case shall require it, may order payment of interest for the time that such dividend shall have been withheld, and of the costs of the application.

A certificated bankrupt cannot maintain *assumpsit*^r against his assignees for his allowance under stat. 5 G. 2. c. 30. s. 7. (his estate having paid 10s. in the pound) if it appear that his certificate was not allowed before payment of the dividends.

VII. Of Actions by the Bankrupt.

An uncertificated bankrupt has a special property in goods acquired by himself after his bankruptcy^s, and may maintain trover for them against strangers.

So if an order for the delivery of goods^t, belonging to A., but in the possession of B., be given by A. to an uncertificated bankrupt, in payment of a debt due from A. to the bankrupt after his bankruptcy, and B. refuses to deliver the goods, the bankrupt may maintain trover against him (44).

In cases of this kind, however, the bankrupt can recover only where the assignees do not interfere^u, for the general assignment of personal property by the commissioners in

^r *Groome v. Potts*, 6 T. R. 548.
^s *Webb v. Fox*, 7 T. R. 391.

^t *Fowler v. Down*, 1 Bos. & Pul. 44.
^u *Kitchen v. Bartsch*, 7 East's R. 53.

(44) These cases proceeded on this ground, that an uncertificated bankrupt has a special property in the goods in his possession, subsequent to the bankruptcy; but notwithstanding these decisions, to *assumpsit* by several partners, the defendant may plead in bar the bankruptcy of one of them. *Eckhardt and others v. Wilson*, 8 T. R. 140.

the first instance passes all the future acquired as well as present personal property, and a second assignment of personal property coming to the bankrupt is not necessary; consequently the superior title of the assignees must prevail where they come forward, and assert it.

To an action on a promissory note^x, and for money lent, the defendant pleaded that the plaintiff was an uncertificated bankrupt, whose effects had been duly assigned by the commissioners under a general assignment, comprehending in terms the future as well as present personal property of the plaintiff, and that the assignees had required the defendant to pay to them the money claimed by the plaintiff. Replication, that the causes of action had accrued after the plaintiff became bankrupt, and that the defendant, at the time of the contract, treated with the plaintiff as a person capable of receiving credit in that behalf, and that the commissioners had not at any time since assigned to the assignees, or any other person, the promissory note or money mentioned to be lent. On demurrer, it was holden, that the replication was bad for the reasons before mentioned.

An uncertificated bankrupt may maintain an action for work and labour done after his bankruptcy^y (45).

Where a commission of bankrupt is taken out fraudulently or maliciously^z, the chancellor may under the stat. 5 Geo. 2. c. 30. s. 23. assign the bond (given by the petitioning creditor) to the bankrupt, so as to enable him to recover the whole penalty of the bond. N. The assignment

x Kitchen v. Bartsch, 7 East's R. 53. z Smith v. Broomhead, 7 T. R. 300.
y Chippendale v. Tomlinson, Co. B. L.
5th edit. p. 431.

(45) So for work and labour, and *materials found*, incident and necessary to the labour, Silk v. Osborne, 1 Esp. N. P. C. 140. So for money lent and advanced, as it will be presumed that the money may have been earned by his labour, Evans v. Brown, 1 Esp. N. P. C. 170.

Lord Ellenborough C. J. speaking of Chippendale v. Tomlinson, and the cases which have been decided on its authority, said^{*}; that the hardship of the case might perhaps have warped the opinion of the judges, when the evil might have been better remedied by statute, but now there was an inveterate practice of above twenty years in support of that series of cases.

* In Kitchen v. Bartsch, 7 East's R. 62.

of the bond by the chancellor is conclusive evidence of the fraud or malice in an action brought on such bond, and it is not necessary to state in the declaration that the commission was fraudulently or maliciously sued out.

See further on this point, *Smithy v. Edmondson*, 3 East's R. 22.

VIII. *Of the Pleadings.*

1. *Of the general Plea of Bankruptcy under Stat. 5 Geo. 2. c. 30. s. 7.*—By stat. 5. Geo. 2. c. 30. s. 7. “ If any bankrupt is afterwards impleaded for any debt due before such time as he became a bankrupt, he may plead in general, that the cause of such action or suit accrued before such time as he became a bankrupt, and may give the special matter in evidence; and the certificate and allowance thereof shall be sufficient evidence of the trading, bankruptcy, commission, and other matters precedent to such certificate, and a verdict shall thereupon be given for the defendant, unless the plaintiff can prove the certificate obtained unfairly, and by fraud, or can make appear any concealment by the bankrupt to the value of 10*l*.”

This general plea of bankruptcy, if pleaded in the Court of King's Bench, does not require the signature of counsel^a; but by the practice of the Common Pleas it ought to be signed by a serjeant^b, otherwise it may be treated as a nullity.

It is sufficient for the defendant under the preceding statute to pursue the words of it, and to aver, that the cause of action accrued before he became a bankrupt; without averring, that the defendant had conformed according to the bankrupt statutes^c, or that the defendant became a bankrupt before the commencement of the suit^d.

By a certificate obtained under a joint commission, separate as well as joint debts are discharged^e. In like manner, by a certificate obtained under a separate commission, joint debts, as well as separate debts, are discharged^f. Formerly, indeed, doubts were entertained whether a certificate under

^a Leigh q. t. v. Monteiro, 6 T. R. 496.

^b Pitcher v. Martin, 3 Bos. & Pul. 171.

^c Willan v. Giordani, Co. B. L. 5th edit. p. 518. in which *Paris v. Salkeld*, 2 Wils. 139 was overruled.

^d Tower v. Cameron, 6 East's R. 413.

^e Howard v. Poole, Str. 995. Dav. 431. S. C. Wickes v. Strahan, Str. 1157. S. P. Horsey's case, 3 P. Wms. 23.

^f Exp. Yale, 3 P. Wms. 24. n.

a separate commission, against one partner, would not discharge the other partner; and, therefore, it was held necessary to provide against such discharge by stat. 10 Ann. c. 15. by the 3d section of which it is enacted and *declared*, "that partners, joint obligors, and joint contractors, with a bankrupt who has been discharged, shall remain liable, as if the bankrupt had never been discharged.

This general plea of bankruptcy may be supported by evidence of a certificate allowed after bill filed, and before plea pleaded^g, the cause of action having accrued^h before the bankruptcy; but the certificate cannot be given in evidence under the general issue, for the debt still exists, and as the certificate only operates as a special discharge from it under the statute, the defendant must avail himself of this discharge in manner prescribed by the statuteⁱ.

But the certificate will operate as a discharge^j of such debts only as are due at the time when the act of bankruptcy is committed (46). Debts proveable under the commission, and debts to be discharged by the certificate, are convertible terms, and debts not due at the time of the act of bankruptcy, except in the cases specially provided for by particular statutes, are not affected by the commission.

Hence where a debt accrues after an act of bankruptcy and before the issuing of the commission^k, the bankrupt will remain liable, although he has obtained his certificate, and cannot avail himself of the general plea of bankruptcy.

But if the acceptor of a bill of exchange not due become bankrupt^l, and the endorser be afterwards obliged to take up the bill on account of non-payment by the acceptor, he may prove the amount under the commission; and consequently if the acceptor afterwards obtain his certificate, he will be discharged from the debt.

Before the stat. 49 Geo. 3. c. 121. a debt for which a per-

^g Harris v. James, 9 East, 82.

^k S. C.

^h Glowland v. Warren, 1 Camp. N. P. C. 363.

^l Joseph v. Orme, 2 Bos. & Pul. N. R. 180.

ⁱ Bamford v. Burrell, 2 Bos. & Pul. 1.

(46) But if an action be commenced against a bankrupt *after* the bankruptcy, for a debt due *before* the bankruptcy, and a verdict found for the plaintiff, and afterwards the bankrupt obtains his certificate; the costs of such action, as well as the original debt, are proveable under the commission. Willet v. Pringle, 2 Bos. & Pul. N. R. 190.

son was merely liable as surety, but which was not paid until after the bankruptcy of the principal, was not proveable under the commission, and consequently was not barred by the certificate^m; but now by the 8th section of that statute it is enacted, " that where at the time of issuing the " commission any person shall be surety for, or be liable for, " any debt of the bankrupt, it shall be lawful for such " surety or person liable, if he shall have paid the debt, or " any part thereof in discharge of the whole debt, although " he may have paid the same after the commission shall " have issued, and the creditor shall have proved his " debt under the commission, to stand in the place of the " creditor as to the dividends upon such proof, and when " the creditor shall not have proved under the commission, " it shall be lawful for such surety, or person liable, to " prove his demand in respect of such payment as a debt " under the commission, not disturbing the former dividends, and to receive a dividend or dividends proportionably with the other creditors taking the benefit of such commission, notwithstanding such person may have become surety or liable for the debt of the bankrupt after an act of bankruptcy had been committed by such bankrupt, provided that such person had not at the time when he became such surety, or when he so became liable for the debt of such bankrupt, notice of any act of bankruptcy, or that he was insolvent, or had stopped payment; provided that the issuing a commission of bankrupt, although such commission shall afterwards be superseded, shall be deemed such notice; and every person against whom any such commission of bankrupt has been or shall be awarded, and who has obtained or shall obtain his certificate, shall be discharged of all demands at the suit of every such person having so paid, or being hereby enabled to prove, or to stand in the place of such creditor, with regard to his debt in respect of such suretyship or liability, in like manner to all intents and purposes as if such person had been a creditor before the bankruptcy for the whole of the debt in respect of which he was surety or was so liable."

The plaintiff accepted a bill of exchangeⁿ, payable at a future day, for the accommodation of the defendant. Afterwards and before the bill became due, the defendant com-

^m Chilton v. Wiffin, 3 Wils. 13. Young v. Hockley, 3 Wils. 346. 2 Bl. R. 839. ⁿ Stedman v. Martinnant, 13 East, 427.
S. C. Vanderheyden v. De Paiba, 3 Wils. 528.

mitted an act of bankruptcy. The bill was dishonoured. A commission issued, but was shortly afterwards superseded. A meeting of the defendant's creditors was then held, and time was given him. The plaintiff then accepted another bill for the purpose of taking up the former dishonoured bill, including also interest and stamp. This last bill was indorsed by J. S. as an additional security to the holders, who required it. Afterwards an effectual commission issued upon the original act of bankruptcy, under which the defendant obtained his certificate. The plaintiff at a subsequent day, when the second bill became due, paid it. It was holden, that the giving of the second acceptance for the prior debt did not discharge the original debt for which the plaintiff had become surety before the act of bankruptcy; and in paying that second bill the plaintiff was only paying the same debt which he was liable to pay as surety for the defendant upon the first bill; and consequently that this was a case within the preceding section of the stat. 43 G. 3. c. 121. by which the surety for a debt proveable under a commission, though not paid by him until after the issuing of the commission, shall stand in the place of the original creditor as to the whole of the debt so paid. The act, however, provided, that it should not extend to a person who, when he became surety, had either notice in fact of the act of bankruptcy committed or implied notice from the issuing of the commission, though such commission were afterwards superseded. But the plaintiff's case did not fall within this proviso, for his suretyship had commenced before the issuing of the commission afterwards superseded. The debt was not affected with the implied notice: it was a debt, therefore, proveable under the commission, and was consequently barred by the certificate.

The plea of bankruptcy is not a plea to the action, but a personal discharge only^o; hence, where an action of assumpsit was brought against A. and B. jointly as partners, and A. pleaded a judgment recovered, and B. pleaded his bankruptcy, and thereupon the plaintiff entered a *nolle prosequi* as to B.; it was holden that the plea of bankruptcy only discharged B.^p, and further, that the entry of the *nolle prosequi* as to B. did not discharge the action as to A.; for it was not like a retraxit, which is a total relinquishment of the suit.

Where the plaintiff's demand rests in damages, and can-

^o Noke and another v. Ingham, 1 Wils. 89.

^p See stat. 10 Ann. c. 15. s. 3.

not be ascertained without the intervention of a jury, it cannot be proved under the defendant's commission. Hence bankruptcy is not any plea in bar to an action of trespass for mesne profits, because the damages are uncertain^q. Nor to an action of trover, though the conversion happened before the bankruptcy^r. Nor can the bankruptcy of the lessee be pleaded in bar to an action of covenant brought against him, for rent arrear, subsequent to his bankruptcy^s.

But now by stat. 49 G. 3. c. 121. (20th June, 1809) s. 19. it is enacted, " That in all cases, in which a commission of
 " bankrupt, shall be sued forth against any person, after the
 " passing of this act, and such person shall be entitled to
 " any lease or agreement for a lease, and the assignees shall
 " accept the same, and the benefit therefrom, as part of the
 " bankrupt's estate, the bankrupt shall not be liable to pay
 " the rent accruing due after such acceptance of the same,
 " nor shall he be liable to be in any manner sued in respect
 " of any subsequent non-observance or non-performance of
 " the conditions, covenants, or agreements therein contained :
 " provided that the lessor or person agreeing to make such
 " lease, his heirs, executors, administrators, or assigns, may
 " (if the assignees shall decline, upon their being required
 " so to do, to determine whether they will or will not so
 " accept such lease or agreement for a lease) apply by peti-
 " tion to the Lord Chancellor, Lord Keeper, or Lords
 " Commissioners of the Great Seal, praying that they may
 " either so accept the same, or deliver up the lease or agree-
 " ment for the lease, and the possession of the premises,
 " who shall thereupon make such order as shall seem meet
 " and just, and which shall be binding on all parties."

In assumpsit on a promise to pay plaintiff a certain sum per week^t for the support of an illegitimate child the plaintiff had had by the defendant, bankruptcy having been pleaded, Lord Ellenborough held, that as to any arrears which had accrued before the bankruptcy, the bankruptcy would operate as a discharge, but as no proof of subsequent arrears would have been admitted under the commission, the defendant was liable for such arrears.

B. sold a ship to A., with a covenant that he had a good title, though in fact he had none^u; afterwards B. became a bankrupt, and A. sustained damages by paying the value of the ship to the true owner; it was holden in an action on

^q Goodtitle v. North, Doug. 583.

^r Parker v. Norton, 6 T. R. 695.

^s Auriel v. Mills, 4 T. R. 94.

^t Miller v. Whettebury, 1 Camp. N. P. C. 428.

^u Hammond v. Toulmin, 7 T. R. 612.

the covenant by A. against B., stating the special damage, that B.'s certificate was no bar.

This plea of bankruptcy^a will not avail a person against whom a second commission of bankruptcy has issued, unless he has paid 15s. in the pound under that commission, although the creditor who sues him has signed the certificate; for, by stat. 5 Geo. 2. c. 30. s. 9. (the first statute which provides for the case of a second bankruptcy) the *person* only of the bankrupt is protected, if his effects are not sufficient to make a dividend of 15s. in the pound.

If a defendant rely on a certificate under a second commission of bankrupt^y, under which he has not paid 15s. in the pound, it will be sufficient for the plaintiff, in order to deprive him of the benefit of it, to produce the proceedings under the former commission, and prove that he submitted to it, without proving the trading, act of bankruptcy, and other facts, which are necessary to support the commission as against third persons.

An action against a bankrupt^z, who has obtained his certificate under a second commission, on a cause of action accruing before his second bankruptcy, may be maintained, before a dividend has been made, or the period for making it allowed by stat. 5 Geo. 2. c. 30. s. 37. is elapsed, if evidence be adduced to shew, that it is not probable from the state of the effects in the hands of the assignees that the bankrupt will be able to pay 15s. in the pound.

Evidence of the Plea of Bankruptcy.—The only evidence required to support the general plea of bankruptcy is the production of the certificate allowed by the chancellor^x; but the creditor may avoid the certificate by shewing that it was obtained unfairly and by fraud^b; as, if some of the creditors have been induced by money, or notes for money, having been given to them by a confidential friend of the bankrupt, to sign the certificate, the certificate is void, whether the bankrupt knew of the money having been given or not^c.

The certificate will not be a bar, if the creditor can shew a concealment to the value of 10l., but on the other hand, the bankrupt may shew that the concealment was not wilful or fraudulent^d.

x Philpott v. Corden, 5 T. R. 287.

Thornton v. Dallas, Doug. 46.

y Haviland v. Cook, 5 T. R. 653. 3

Esp. N. P. C. 195.

z Jelfs v. Ballard, 1 Bos. & Pul. 467.

a See the statute.

b Robson v. Calze, Doug. 228

c Holland v. Palmer, 1 Bos. & Pul. 95.

d Cathcart v. Blackwood, D. P. 26 Feb. 1765.

By stat. 5 Geo. 2. c. 30. s. 12. the bankrupt shall not avail himself of the certificate in the following cases.

1. "If upon the marriage of any of his children he shall have given above the value of 100*l.* unless he shall prove by his books or otherwise, upon oath, before the commissioners, that he had at the time, over and above the value so given, sufficient to pay all his creditors their debts:"

2. "Or if he shall have lost in any one day, at any game, or by having a share in the stakes or betting on either side, the value of five pounds, or 100*l.* in the whole, within *twelve months* next preceding the bankruptcy" (47):

3. "Or if within *one year* before he became a bankrupt he shall have lost 100*l.* by any contract, with respect to any stock of any company or corporation, or any parts of any public funds or securities, where the contract was not to be performed within one week from the making such contract; or where the stock was not actually transferred or delivered in pursuance of the contract."

The preceding clauses, being penal, are construed strictly.

By stat. 49 G. 3. c. 121. s. 6. it is enacted, "That after Jan, 1, 1810, if assignees (who are indebted to the estate of the bankrupt in 100*l.* or upwards in respect of money come to their hands as assignees, and wilfully retained or employed by them for their own benefit) shall become bankrupt, the certificate which may be obtained by them shall only have the effect of freeing the person from arrest and imprisonment, but the future effects of such assignees shall remain liable for so much of their debt to the estate of the bankrupt, as shall not be paid by dividends under their commission, with interest; (tools of trade, necessary household goods and furniture, and necessary wearing apparel of bankrupt and wife and children excepted).

And by the 14th section of the same statute it is enacted, "That after the 20th June, 1809, it shall not be lawful for any creditor, who has or shall have brought any action, or instituted any suit against any bankrupt in respect of any demand which arose prior to the bankruptcy, or which might have been proved as a debt under the commission,

(47) Insuring in the lottery is not gaming within the meaning of this clause, *Lewis v. Piercy*, 1 H. Bl. 29. Nor keeping a lottery office. *Ex parte Richardson*. Co. B. L. 5th edit. p. 463,

“ to prove a debt under such commission for any purpose
 “ whatever, or to have the claim of a debt entered upon the
 “ proceedings under such commission, without relinquish-
 “ ing such action or suit, and all benefit from the same;
 “ and that the proving or so claiming a debt under a com-
 “ mission, by any creditor, shall be deemed an election by
 “ such creditor, to take the benefit of such commission with
 “ respect to the debt so proved or claimed by him; pro-
 “ vided always, that such creditor shall not be liable to the
 “ payment, to the bankrupt or his assignees, of the costs of
 “ such action or suit which shall be so relinquished by him:
 “ and provided also, that where any such creditor shall
 “ have *brought* any action or *suit* against such bankrupt
 “ jointly with any other person or persons, his relinquish-
 “ ing such action or suit against such bankrupt or bank-
 “ rupts, shall not in any manner affect such action or suit
 “ against such other person or persons.”

An express promise (48) by a bankrupt after having obtained his certificate, to pay an antecedent debt, is binding^e; but if the promise be to pay when he is able, the plaintiff must prove ability at the time of action brought^f.

In the case of an express promise after certificate, the plaintiff is not obliged to declare specially^g, but may declare on the original cause of action; and if the bankruptcy be pleaded the plaintiff may give the subsequent promise in evidence.

If a bond for the payment of money, has been forfeited before bankruptcy^h, quære, whether payment of interest by the bankrupt, after certificate, will render him liable to be sued on the bond?

Of Discharge by Certificate in foreign Country.—What is a discharge of a debt in the country where it is contracted, is a discharge of it every where (49).

^e Trueman v. Fenton, Cowp. 544.

^f Besford v. Saunders, 8 H. Bl. 116,
per 3 Jus.

^g Williams v. Dyde, Peake, N. P. C.
68. cites Russell v. Hardman, B. R.
M. 33 G. 3. S. P.

^h Alsop v. Brown, Doug. 191.

(48) The promise must be precise and positive; for if it be given by the bankrupt in loose general terms, e. g. “ that his effects will pay 20s. in the pound, and that he will pay every body,” it will not be binding. Lynbury v. Weightman, 5 Esp. N. P. C. 198. Ellenborough C. J.

(49) This principle was recognised in Hunter v. Potts, 4 T. R. 182.

Hence, if a bankrupt in Ireland, obtain his certificate there, and come into England, he will be discharged by such certificate from a debt *contracted in Ireland*, prior to the commission¹.

So where the plaintiff gave the defendant at Baltimore in America, where both were resident, a bill of exchange drawn by the defendant upon a person *in England*, which bill was afterwards protested here for non-acceptance², and the defendant afterwards, while he was resident abroad, became a bankrupt there, and obtained a certificate of discharge by the law of that state; it was holden; that such certificate was a bar to an action here upon an implied assumpsit to pay the bill in consequence of the non-acceptance in England; Lawrence J. observing, that when the plaintiff agreed to take the bill in question, the promise in effect was this, to pay the money in America, if it were not paid here. Then the bill having been refused acceptance here, the implied promise to pay the money arose in America, and consequently the defendant's certificate was a bar to the demand.

But a discharge under a commission of bankrupt in a foreign country, is not any bar to an action for a debt contracted *here* with a subject of this country¹.

Set-off.—By stat. 5 Geo. 2. c. 30. s. 28. “Where it shall appear to the commissioners, or the major part of them, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became a bankrupt, the commissioners, or the major part of them, or the assignees of such bankrupt's estate shall state the account between them, and one debt may be set against another, and what shall appear to be due on either side of the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively.”

Plea of Set-off.—It was formerly holden that a set-off could not be allowed as against the assignees of a bankrupt²; but in a modern case, where an action was brought by the assignees of a bankrupt, the court said, they were clearly of opinion that the defendant might set off a debt due to him from the bankrupt³. The debt, however, intended to be set

¹ Ballantine v. Golding, Co. B. L. 5th edit. p. 499.

² Potter v. Brown, 5 East's R. 124.

¹ Smith v. Buchanan, 1 East's R. 6.

² Ryall v. Larkin, 1 Wils. 155.

³ Ridout v. Brough, Cowp. 133.

off must have accrued before the act of bankruptcy^o, for where defendant attempted to set off a note which had been endorsed to him after the bankruptcy, the court resisted the attempt.

So defendant cannot set off cash notes issued by the bankrupt^p, payable to J. S. or bearer, though the notes bear date before the bankruptcy, unless the defendant shews that such notes came to his hand before the bankruptcy (50).

The defendants had accepted bills for the accommodation of a trader. He, after committing an act of bankruptcy, but before a commission was sued out, lodged money with the defendants for the purpose of taking up the bills, which did not become due until after the commission was sued out, and were then paid by the defendants. It was holden^q, that the defendants were bound to refund this money to the assignees; and that they were not entitled to a set-off under the preceding statute: for the statute is expressly confined to mutual credit and mutual debts *at any time before such person became a bankrupt*. The money in question was not the bankrupt's money, but the money of his assignees: it was always a debt due to them, and consequently a debt due from the bankrupt could not be set off against it.

IX. Of the Evidence, and Witnesses.

FORMERLY in actions brought by the assignees of a bankrupt, it was incumbent on them to prove, in all cases,

1. That the bankrupt was a trader within the meaning of the statutes.
2. The act of bankruptcy.
3. That the commission was regularly granted.
4. The assignment to the plaintiffs.
5. A right of action in the assignees.

^o Marsh v. Chambers, Str. 1234.
^p Dickson v. Evans, 6 T. R. 57.

^q Tamplin v. Diggins, 2 Camp. N. P. C. 312.

(50) Lawrence J. observed, in this case, that if the notes had been made payable to the defendant himself, he should have thought it reasonable evidence of their having come to his hands at the time they bore date.

But now by stat. 49 G. 3. c. 121. s. 10. (passed 20th June, 1809) it is enacted, "that after the passing of this act, in any action now brought, or hereafter to be brought, by or against any assignee of any bankrupt, the commission of bankrupt, and the proceedings of the commissioners under the same, shall be evidence to be received of the petitioning creditor's debt (51) and of the trading and bankruptcy of such bankrupt, unless the other party in such action shall, if defendant, at or before the time of his pleading to such action, and if plaintiff, before issue joined, give notice (52) in writing to such assignee that he intends to dispute such matters or any of them; and where such notice shall have been given, if such assignee shall at the trial prove the matter so disputed, or the other party shall at the trial admit the same, the judge before whom the cause shall be tried, shall, if he shall see fit, grant a certificate that such proof or admission was made upon such trial, and such assignee shall be entitled to the costs, to be taxed by the proper officer, occasioned by such notice; and such costs shall, in case the assignee shall obtain a verdict, be added to his costs, and, if the other party shall obtain a verdict, shall be set off or deducted from the costs, which such other party would otherwise be entitled to receive from such assignee."

Having in the three first sections of this chapter enumerated the different trades which render persons liable to the bankrupt laws, and also the several acts of bankruptcy mentioned in the statutes, it will be unnecessary to repeat them here; I shall proceed therefore to the examination of the third head, viz. the proof relating to the commission.

(51) By virtue of this clause even the deposition of the petitioning creditor before the commissioners (being a part of the proceedings) becomes evidence of his debt in all cases where notice has not been given that it is intended to dispute the petitioning creditor's debt*.

(52) The notice is not to be considered as part of the defendant's evidence. It may be proved as soon as the commission is produced, and it will immediately put the opposite party upon supporting the commission in the same manner as before this statute was made. *Decharme v. Lane*, 2 Camp, N. P. C. 324. When defendant has been permitted to withdraw his plea and plead *de novo*, he may give the notice with the second plea; and that will be sufficient, although no notice was given with the first plea. S. C.

* *Bisbee v. Randall*, 2 Camp. N. P. C. 493. Lawrence J.

3. Proof of the commission ought to be by shewing it under seal^r, the petition to the chancellor on which it was granted, and the debt of the petitioning creditor or creditors. By stat. 5 Geo. 2. c. 30. s. 23. no commission shall issue upon the petition of one or more creditors, unless the single debt of the creditor, or of two or more persons being partners, amount to 100*l.* or upwards; of two creditors, to 150*l.* or upwards; of three or more creditors, to 200*l.* or upwards.

If the debt, as against the bankrupt^s, amount to the sum required, it is sufficient, though the creditor should have acquired it for less; as where the debt (amounting to 100*l.*) consisted of notes payable by the bankrupt to other persons, who before the act of bankruptcy, had endorsed them to the petitioning creditor upon his paying 10*s.* in the pound for them; it was holden, that this debt was capable of supporting the commission.

If a creditor to the amount required before an act of bankruptcy^t, receives, after notice of the bankruptcy, a part of his debt so as to reduce it under 100*l.*, he is not precluded from suing out a commission, because the part payment of the debt was illegal and cannot be retained: consequently, the original debt remains in force to support the commission.

So where the petitioning creditor's debt had been reduced below the amount required^u, by a bill drawn by the bankrupt on a person who, not having any effects of the bankrupt, refused to accept it, the original debt was considered as still in force, and sufficient to support the commission.

A commission sued out upon the affidavits of four petitioning creditors, whose debts do not appear upon the face of those affidavits to amount to 200*l.* is not void, the provision in the act^x respecting such affidavits being directory only, and not conditional^y.

In order to prove the petitioning creditor's debt^z, the assignees relied on an entry in the bankrupt's books^a, made some months before the act of bankruptcy, wherein it was stated that the bankrupt was indebted to the petitioning

^r Bull. N. P. 41.

^s Ex parte Lee, 1 P. Wms. 782.

^t Mann v. Shepherd, 6 T. R. 79.

^u Bickerdike v. Bollman, 1 T. R. 405.

^x Hill v. Heale, 2 Bos. & Pul. N. R.

196.

^y 5 G. 2. c. 30. s. 23.

^z Jackson v. Irvin, B. R. 2 Camp. N. P. C. 48.

^a See Ewer v. Preston, C. T. H. 372.

creditor in more than 200*l*.; but there was not any evidence that the debt continued down to the time of the bankruptcy; but *Ld. Ellenborough C. J.* held that the debt being proved to have once existed, its continuance would be presumed.

Taking a security of a higher nature^b, after the bankruptcy, for a debt of an inferior nature, contracted before, does not so far extinguish the original debt as to prevent the creditor from suing a commission upon it; as in the case of a bond taken for a simple contract debt.

A. a trader^c, before he commits any act of bankruptcy, draws a promissory note for 200*l*., payable to B. or order, then A. commits an act of bankruptcy, and afterwards B. endorses the note over to C., who is the petitioning creditor; it was holden *per totam curiam*, that he may well be so, for the 200*l*. was a debt due from the bankrupt before he committed the act of bankruptcy, to some person, viz. to B.

In a case^d, where the petitioning creditor had a debt of 100*l*. due at the time of his petitioning upon two bills for 50*l*. each, drawn and issued before the act of bankruptcy, but which did not fall due till afterwards; the court were of opinion, that this constituted a good petitioning creditor's debt; for the stat. 7 Geo. 1. c. 31. which admitted of the proof under commissions of bankrupt of debts arising on securities payable at a future day, provided that no creditor upon such securities should be deemed to be a sufficient creditor to petition for any commission, "until such time as such debt should become due and payable." Therefore the legislature must have intended, that when the debt did become due to the holder of such securities, he might be a petitioning creditor. It should be remarked, that in this case the bankrupt was indebted in more than 100*l*. at the time of the act of bankruptcy, to different creditors, although no single creditor could then have made a good petitioning creditor.

Goods sold and delivered^e upon an agreement to be paid for by a present bill payable at a future day, does not create a present debt on which a commission of bankrupt can be founded. Neither can such executory contract, if no such bill payable at a future day be actually given, constitute a good petitioning creditor's debt within the stat. 7 Geo. 1.

^b *Ambrose v. Clendon*, Str. 1042. and
Ca. Temp. Hard. 267.

^c *Anou. C. B.* 2 Wils. 135.

^d *Brett v. Levett*, 13 East, 213.

^e *Hoskins v. Duperoy*, 9 East, 499.
but see stat. 49 G. 2. c. 121. s. 9.
post p. 236.

c. 31. s. 1. and 5 Geo. 2. c. 30. s. 22. the legislature clearly intending to confine the power of petitioning for a commission of bankrupt to such creditors as have *written securities payable at a future day*. The stat. 46 Geo. 3. c. 135. s. 5. has not made any alteration in the law in this respect^f.

The debt of the petitioning creditor must be a legal debt; hence the assignee of a bond cannot be the petitioning creditor^g. But a simple contract debt, though of above six years standing, will be sufficient^h; for though the statute of limitations takes away the remedy, it does not destroy the debt.

Where the debt is due to a partnership, it must appear that all the partners to whom it is due concur in the proceeding. Hence a commission issued on the petition of one only of two partners to whom a joint debt is due, cannot be supportedⁱ.

A debt due to an attorney for his bill of costs, although a bill has not been signed and delivered by him in pursuance of stat. 2 G. 2. c. 23. s. 22. is notwithstanding a legal debt, and will support a commission^k.

It is a general rule, that the debt must have been contracted before the act of bankruptcy.

But by stat. 7 Geo. 1. c. 31. reciting that traders had been obliged to sell their goods upon credit, and to *take bills, bonds, and promissory notes, or other personal securities for their monies payable at a future day*, and that the buyers becoming bankrupts, before the money upon the securities became payable, it had been a question whether such persons giving credit on such securities should be let in to prove their debts, it is enacted and *declared*, "that all persons giving credit on such securities upon a good and valuable consideration *bonâ fide* for any sum of money, or any thing not due or payable at or before the bankruptcy, shall be admitted to prove their bills, bonds, notes, or other securities, *promise or agreement for the same*, in the same manner as if they were made payable presently, and not at a future day." By a proviso, however, in this act, (s. 3.) such creditor was disabled from petitioning for a commission, until the debt became actually payable. But this disabling proviso is repealed by stat. 5 Geo. 2. c. 30.

^f Moss v. Smith, B.R. H. 49 G. 3. MS.

^g Medlicot's case, in Ch. Str. 899. per Lord Macclesfield C. in ex parte Lee, 1 P. Wms. 793. S. P.

^h Quantock v. England, 5 Burr. 2628.

adopting the opinion of Eyre C. J. in Swayn v. Wallinger, Str. 746.

ⁱ Buckland v. Newsame, 1 Taunt. 477.

^k Exp. Sutton, 11 Ves. jun. 164. Ld. Eldon, Ch.

s. 22. and it is thereby enacted, "that a creditor having bills, bonds, notes, or other personal securities (omitting promise or agreement for the same) may petition for a commission." This last clause has been considered as a legislative construction of the 7 Geo. 1. confining the operation of that statute to written securities only¹.

A. drew a bill of exchange on B. (who accepted the same) payable two months after date to A.'s^m own order. Soon after the acceptance, but before the bill became due, A. the drawer, (having previously endorsed the bill) became a bankrupt. Payment having been refused, the holder brought an action against A. the drawer, who defended it on the ground of his bankruptcy, and, having obtained his certificate; it was objected on the part of the plaintiff, that there was a distinction between this case, where the bill having been accepted, the drawer only became contingently liable in default of the acceptor, which default was not made until after the bankruptcy, and consequently no debt due from the drawer before; and prior cases which had been decided, where the bill having been refused acceptance, the drawer became immediately liable. That the bankruptcy of the drawer having happened before the day of payment arrived, the bill could not be proved under his commission; for there was not then any *debitum in presenti solvendum in futuro*; but it was altogether contingent whether the bankrupt would ever be indebted or not. On the part of the defendant, the case of *Macarty v. Barrow* was relied on, where it was resolved, that a debt is created immediately upon drawing the bill. The court were of opinion, that the defendant was discharged by his certificate; Lord Ellenborough C. J. observing, that the plain letter of the stat. 7 Geo. 1. c. 31. was decisive of the question; and that it was not necessary to resort to the opinion delivered in *Macarty v. Barrow*, the propriety of which his lordship seemed to doubt. Grose J. declared his concurrence on the ground of the statute; but observed also, that he should hesitate long before he decided against the doctrine laid down in *Macarty v. Barrow*, which had been often recognized since, that the drawing of a bill of exchange constituted a *debitum in presenti* from the drawer, though *solvendum in futuro*.

By stat. 49 G. 3. c. 121. (20th June, 1809) s. 9. it is enacted, "that all persons who have given credit, or shall at any time hereafter give credit, to any person or persons who is, or are, or shall become bankrupts, upon good and valuable

¹ *Hoskins v. Duperoy*, 9 East, 503.

^m *Starey v. Barnes*, 7 East, 435.

“ consideration *bond fide* for any money, which is, or shall
 “ not be due or payable at or before the time of such per-
 “ son’s becoming bankrupt, shall be admitted to prove such
 “ their debts in like manner as if the same were payable
 “ presently or not at a future day, and shall be entitled to,
 “ and shall have and receive proportional dividends of such
 “ bankrupt’s estate equally with the other creditors of such
 “ bankrupt, deducting only thereout a rebate of interest for
 “ what they shall so receive at the rate of five pounds per
 “ centum per annum, under commissions which have issued,
 “ or shall issue, in England, and at the rate of six pounds
 “ per centum per annum under commissions which have is-
 “ sued, or shall issue, in Ireland, to be computed from the
 “ actual payment thereof to the time such debts would become
 “ payable, according to the terms upon which the same were
 “ contracted.”

It is also an established rule, that the assignees must prove the debt of the petitioning creditor, by the same evidence which must have been produced in an action against the bankrupt.

Hence, in order to prove a petitioning creditor’s debt, which arises by bond, proof of the acknowledgment of the obligor will not supersede the necessity of calling the subscribing witness^a.

Entries made by the bankrupt in his books, before the act of bankruptcy^b, provided the import of them is clear and unequivocal, are to be considered in the same light as parol declarations of the bankrupt, and therefore sufficient proof of the petitioning creditor’s debt.

The commission must appear to have been regularly granted.

Where there are three partners, and two only commit acts of bankruptcy, there may be separate commissions against the two, but there cannot be a joint^c commission against them (53). So where one of three partners is an infant^d, lunatic, or residing abroad^e, there may be separate

^a Abbot v. Plumbe, Doug. 215.

^b Watts v. Thorpe, 1 Camp. N. P. C. 376.

^p Allen v. Downs, B. R. M. 25 Geo. 3.

cited in a note to Scott v. Surman, Willes, 474.

^q Ex parte Henderson, 4 Vesey jun. 163.

^r Ex p. Layton, 6 Ves. jun. 434.

(53) If three be bound jointly and severally in a bond, the obligee ought to sue them all jointly, or each of them separately, for if he sue two only of the three, advantage may be taken of the omission by a plea in abatement, that another jointly sealed the

commissions against the other two, if they commit acts of bankruptcy.

A second commission sued out against a bankrupt, pending a former, under which he has not obtained his certificate is void^s; for an uncertificated bankrupt is incapable of trading for his own benefit.

A commission founded upon an act of bankruptcy, by lying two months in prison, cannot be sued out before the expiration of the two months. The act is not completed before that time, and the affidavit to obtain it would be perjury^t.

A debtor of the bankrupt resisting a claim made by the assignees under the commission against him may give in evidence, in order to defeat such commission, a prior act of bankruptcy, *and* a sufficient petitioning creditor's debt existing at the time of such prior act of bankruptcy. But neither the bankrupt^u, or any person claiming under him will be permitted to avail himself of this defence^x. Nor will proof of a prior act of bankruptcy avail, unless a petitioning creditor's debt be shewn to exist prior to the act of bankruptcy^y; it is not, however, required to be shewn, that the creditor ever meant to take out a commission upon that debt.

The circumstance of a creditor having proved a debt under a commission will not estop him from impeaching the commission in an action brought by the assignees against himself^z.

The debt of a creditor, who has joined in a petition to supersede a prior commission, and proved his debt under a second commission, coupled with an act of bankruptcy prior to that on which the second commission is founded, may be set up to defeat such second commission, by a de-

^s *Martin v. O'Hara*, Cowp. 823.

^t *Gordon v. Wilkinson*, 8 T. R. 507.

^u *Parker v. Manning*, cited in *Doe v.*

Boulcot, 8 Esp. N. P. C. 597. *Mercer v. Wise*, 3 Esp. N. P. C. 216.

^x *Donovan v. Duff*, 9 East, 21.

^y Per Lord Eldon C. in *R. v. Bullock* 1 Taunton's R. 88. See also *Miles v. Rawlins*, 4 Esp. N. P. C. 191.

^z *Stewart v. Richman*, 1 Esp. N. P. C. 108. *Hope v. Fletcher*, Bristol Sum. Ass. 1808.

bond, and that he is still living. Per Keble, to which Brian C. J. agreed, 10 H. 7. 16 a. b. Bro. Obl. 94. This matter, however, cannot be given in evidence on *non est factum*, nor can advantage be taken of it, in any other way than by a plea in abatement. See Serjt. Williams's note on *Cabell v. Vaughan*, 1 Saund. 291. b. n. (4).

fendant in an action at the suit of the assignees under that commission. *Beardmore v. Shaw*, 1 Bos. & Pul. N. R. 263.

4. The assignment is to be proved by the production of the deed^a, and proof of the execution of it by the commissioners.

5. The cause of action must be proved by the assignees in the same manner, as if the action had been brought by the bankrupt himself. It is impossible to lay down any rules with respect to this head of proof, which must necessarily be adapted to the nature of the demand.

In trover by assignees against a sheriff or creditor, who has seized the bankrupt's goods in execution, after an act of bankruptcy, it is not necessary to prove a demand and refusal^b; because the property being vested in the assignees from the time of the bankruptcy, the execution is tortious; and where a possession is gained wrongfully, a demand is not necessary.

Of the Witnesses.—The bankrupt cannot be a witness to swear property in himself^c, or a debt due to himself, unless he has obtained his certificate, and executed a release to the assignees of his share in the surplus and the dividends; for otherwise it is manifest that he is interested; but he may prove property in, or a debt due to, another. It may be observed, however, that a release and certificate cannot make the bankrupt a witness to prove his own act of bankruptcy^d(54).

No question can be asked from the bankrupt, the object of which is to support his own bankruptcy; and it is immaterial whether such question be asked upon an examination in chief, or upon a cross examination^e. It is equally improper in both cases. Nor can a bankrupt(55) be asked questions, the effect and tendency of which is to establish an antecedent act of bankruptcy^f.

^a Bull. N. P. 41.

^b *Rush v. Baker*, M. 8 G. 2. B. R. MSS. Bull. N. P. 41.

^c *Ewens v. Gold*, per Hardwicke C. J. H. 9 G. 2. Bull. N. P. 43.

^d *Field v. Curtis*, Str. 829.

^e *Elsom v. Brailey*, C. B. London Sit-
tings after M. T. 50 G. 3. Lawrence
J. S. P.

^f *Wyatt v. Wilkinson*, C. B. London
Sittings, Chambre J. 5 Esp. N. P.
C. 187.

(54) "For although the bankrupt has obtained a certificate, yet if he be not a bankrupt (as he cannot be if he has not committed an act of bankruptcy, which is the question) his certificate and all the proceedings under the commission, are void."

(55) In an action by the assignees of a bankrupt for money had

Nor to explain an equivocal act of bankruptcy^g.

Nor, if a joint commission issues against two, can one, having obtained his certificate, be called to prove an act of bankruptcy committed by the other^h.

But although the bankrupt cannot be a witness to prove his own act of bankruptcy, yet what was said by him, *at the time*, in explanation of his own act, may be received in evidenceⁱ. Hence, if he has been absent from home, a declaration by him on his return home, that he had been abroad in order to avoid creditors, is good evidence.

A certificated bankrupt cannot be a witness to prove any of the facts necessary to support the commission^k, as the petitioning creditor's debt^l, &c. because he is interested in upholding the commission, on the validity of which his certificate and discharge from his former debts depend (56). But to prove other matters he may^l, that is, when he has executed a release to his assignees of his share in the surplus and dividends. See ante.

^g Hoffman v. Pitt, 5 Esp. N. P. C. 22. Ellenborough C. J.

^h Flower v. Herbert, cited 2 H. Bl. 279.

ⁱ Bateman v. Bailey, 5 T. R. 512. Ewens v. Gold, per Hardwicke C. J. Bull. N. P. 40. S. P.

^k Per Cur. in Chapman v. Gardner, 2 H. Bl. 279.

^l Per Ryder C. J. in Flower v. Herbert, London Sitings, Dec. 17, 1754. 2 H. Bl. 279. n. (a).

and received, in order to establish the act of bankruptcy, the plaintiffs proved that the trader had absconded for fear of being arrested. The defendant in order to substantiate his defence in proof called the bankrupt. The plaintiffs offered to cross examine him, as to the time of his first secreting himself for fear of being arrested. Norton and Ford for defendant objected, that he could not be examined to that fact; for he was not a competent witness, being interested to establish his bankruptcy; and it was settled that the plaintiffs could not produce him to prove an act of bankruptcy, though he might be examined as to collateral matter. On the part of the plaintiffs it was admitted, that he could not be produced by the plaintiff as a witness in chief to that fact, but when the defendant called him, and made him a competent witness in the cause, he submitted to his being examined and could not prevent any question being asked his own witness. Lee. C. J. "I think the defendant by calling the witness, has waved all objections to his competency; and therefore he may be examined as to the time of the bankruptcy." Fletcher and Bolton, assignees of Gill, bankrupt v. Woodmass, B. R. London Sitings, M. 25 G. 2. MS.

(56) The certificate may be considered also as a release, which the releasee can never be allowed as a witness to affirm. Per Ryder C. J. in Flower v. Herbert, N. P. 2 H. Bl. 279. n. (a).

A certificated bankrupt, under a second commission of bankruptcy, cannot be a witness for the assignees under that commission^m, if he has not paid 15s. in the pound under it.

An uncertificated bankrupt may be a witness *against* himself, but not *for* himself, that is, he may be a witness to decrease the fund, but not to increase itⁿ.

Upon an issue out of chancery to try, whether the bankrupt had, within one year before his bankruptcy, lost five pounds in one day at gaming, a creditor of the bankrupt was called to prove the gaming; but the C. J. would not allow him to be a witness; because he would be entitled to a share out of the bankrupt's allowance forfeited by the gaming^o.

A creditor who has released his debt to the assignees, may be called to prove the act of bankruptcy, although the bankrupt is plaintiff in the action in which the commission is disputed^p.

A release to the assignees only is sufficient without giving one to the bankrupt^q.

A creditor who has sold his debt is a good witness to support the commission, by proving the petitioning creditor's debt; because his interest is gone^r; but the petitioning creditor is not a competent witness, to shew that the commission was regularly sued; for he enters into a bond to the chancellor, conditioned to establish the several facts upon which the validity of the commission depends, and to cause it to be effectually executed. He has therefore a direct interest in the question at issue^s. But he is competent to prove the commission invalid^t.

^m Kennet v. Greenwollers, Peake's N. P. C. 3. per Kenyon & J.

ⁿ Butler v. Cooke, Cowp. 70. and Walker v. Walker, there cited.

^o Shuttleworth v. Bravo, Str. 507. per Pratt C. J. Middlesex Sittings.

^p Koopes v. Chapman, Peake's N. P. C. 19. per Kenyon & J.

^q Ambrose v. Clendon, Ca. Temp. Hardw. 267.

^r Granger v. Furlong, 2 Bl. Rep. 1273.

^s Green v. Jones, 2 Camp. N. P. C. 411.

^t Anon. cited by Lord Ellenborough C. J. in Green v. Jones.

C H A P. VIII.

BARON AND FEME.

I. Of the Liability of the Husband,

1. *In respect of Contracts made by the Wife before Coverture.*
2. *In respect of Contracts made by the Wife during Coverture.*
3. *In respect of the Children of the Wife by a former Husband.*

II. In what Cases a Feme Covert may be considered as a Feme Sole.

III. Of Actions by Husband and Wife,

1. *Where the Husband and Wife must join,*
2. *Where the Husband must sue alone.*
3. *Where the Husband and Wife may join, or the Husband may sue alone, at his Election.*

IV. Of Actions against Husband and Wife.

I. Of the Liability of the Husband,

1. *In respect of Contracts made by the Wife before Coverture.*
2. *In respect of Contracts made by the Wife during Coverture.*
3. *In respect of the Children of the Wife by a former Husband.*

1. **I**N respect of Contracts made by the Wife before Coverture.—The husband is liable to the debts of his wife,

contracted by her before the coverture, and the husband and wife may be sued for such debts during the coverture^a(1). But if these debts are not recovered against the husband and wife, in the life-time of the wife, the *husband* cannot be charged for them either at law^b or in equity after the death of the wife (2).

The defendant's wife^c, before marriage, gave a promissory note for 50*l.* to the plaintiff, and afterwards married the defendant, who had with her personal estate to the amount of 700*l.*, part whereof consisted of choses in action. The plaintiff did not during the coverture recover judgment upon the note against the husband and wife. The wife died about a year after the marriage. The defendant on her death took out letters of administration. Some of the choses in action had been received by the defendant as husband in the life-time of the wife, the rest he took as her administrator. The plaintiff finding that the choses in action were not sufficient to satisfy his demand, filed a bill against the defendant, praying that the defendant should be made liable to answer his the plaintiff's demand, for so much as he had received out of the clear personal estate of the wife upon his marriage.

Lord Talbot Ch. said, that as on the one hand the husband was by law liable, during the coverture, to all debts contracted by his wife; *dum sola*, whatever their amount might be^d, although she did not bring him a portion of one shilling; so, on the other hand, it was certain, that if such debts were not recovered during the coverture, the husband, as such, was not chargeable, let the fortune he received with his wife be ever so great. He added, that the wife's choses in action were assets, and thereupon decreed an account of what the husband had received since his wife's death as her administrator, and that he should be liable for so much only; but as to any further demand against him, dismissed the bill.

2. *In respect of Contracts made by the Wife during Cover-*

^a F. N. B. 120. F.

^b F. N. B. 121. C. 1. Rol. Abr. 351.
(G.) pl. 2.

^c Heard v. Stamford, 3 P. Wms. 409.

Ca. Temp. Talb. 173. S. C.

^d F. N. B. 120. F.

(1) In actions for the recovery of such debts, husband and wife must be joined, 7 T. R. 348.

(2) But if the wife survive the husband, an action may be maintained against her for the recovery of these debts. Woodman v. Chapman, 1 Camp. N. P. C. 189. Ed. Ellenborough C. J.

ture.—All the personal estate of which the wife is possessed in her own right, is by the marriage vested absolutely in the husband^e. Notwithstanding the law thus divests the wife of all her personal property, she cannot bind her husband by any contracts, even for necessities suitable to her degree and estate, without the assent of her husband either express or implied (3).

During cohabitation, the law will, from that circumstance, presume the assent of the husband to all contracts made by the wife for necessities suitable to his degree and estate, and the misconduct, or even the adultery of the wife, during that period, will not destroy this presumption. The same law is, where the husband deserts his wife, or turns her away, without any reasonable ground (4), or compels her by ill usage or severity^f to leave him; in all which cases, he gives the wife a general credit. This principle which tends to procure credit to the wife for necessities suitable to the degree and estate of her husband, is anxiously adopted by the law on every possible occasion; and although, in conformity with the ancient rule respecting dower, it has been decided, that where the wife elopes with an adulterer, the husband's assent to her contracts, during the term of the elopement, cannot be implied, yet, by analogy to the same rule^g, as soon as he receives her again, the presumption of law revives, and attaches upon the contracts made by her after the reconciliation.

But it should be observed, 1st. as cohabitation is evidence only of the husband's assent^h, in a special verdict, that assent

^e 1 Inst. 351 b.

^f Per Lord Kenyon C. J. in *Hodges v. Hodges*, 1 Esp. N. P. C. 441.

^g Per Lord Kenyon, C. J. 4 Esp. N. P. C. 42.

^h *Manby v. Scott*, 1 Bac. Abr. 296.

(3) "A feme covert generally cannot bind or charge her husband by any contract made by her without the authority or assent of her husband, precedent or subsequent, express or implied." Mr. J. Hyde's argument in *Manby v. Scott*, 1 Mod. 125.

(4) "If the husband turns his wife out of doors, though he advertises her, and cautions all persons not to trust her, or if he even gave particular notice to individuals not to give her credit, still he would be liable for necessities furnished to her; for, the law has said, that where a man turns his wife out of doors, he sends with her credit for her reasonable expenses." Per Lord Kenyon C. J. in *Harris v. Morris*, 4 Esp. N. P. C. 42. See also *Boulton v. Prentice*, post p. 249. where the court said the husband appears to be a wrong doer, and therefore has not a right to prohibit any person.

ought to be found ; and, 2ndly, as cohabitation is *presumptive* evidence only of such assent, it may be rebutted by contrary evidence. In like manner^l, evidence that the articles purchased were consumed in the family of the husband, is only presumptive and not conclusive evidence of the husband's assent.

Having thus laid down the general positions respecting contracts made by the wife, I shall proceed to establish them by authorities, premising, that the relation of husband and wife is, in respect of the wife's contracts binding the husband, analogous to the relation of master and servant. Indeed, in contemplation of law, the wife is the servant of the husband. In F. N. B, 120 G. it is thus laid down: A man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority unto his bailiff or servant to buy and sell for him; *and so for the contract of the wife, if he give such authority to his wife, otherwise not.* From this passage it appears, that the husband is not liable to his wife's contracts, unless he has given his authority or assent; it is incumbent, therefore, on a creditor, who brings an action against a husband upon a contract made by his wife, to shew that the husband has given such assent, or to lay before a jury such circumstances as will enable them to presume that such assent has been given^k; and in the latter case, if such presumption is not rebutted by contrary evidence, the jury may find against the husband, but not otherwise; for the wife has not any power originally to charge the husband^l, but is absolutely under his power and government, and must be content with what the husband provides, and if he does not provide necessaries for her, her only remedy is in the spiritual court.

In an action on the case for goods sold and delivered^m, the evidence to charge the defendant was, that the defendant's wife bought the goods to make her clothes, and that they cohabited. On the other side it was proved, that she was not in any want of clothes when she purchased these, and that the defendant, the last time that he paid the plaintiff, warned the plaintiff's servant not to trust her any more, and to give his master notice of it. Holt C. J. said, that during cohabitation the husband shall answer all contracts of the wife for necessaries, for his assent shall be presumed to all such con-

ⁱ 1 Sid. 121, 126. S. C.

^k 1 Sidf. 127.

^l Per Holt, C. J. in *Etherington v. Parrot*, *Ld. Raym.* 1006.

^m *Etherington v. Parrott*, *Salk.* 118.

and Raym. 1006. This case was agreed per cur. to be good law in *Boulton v. Prentice*, *M. T.* 18 G. 2. *Ford's MSS.*

tracts upon the account of cohabiting, unless the contrary appear. But if the contrary appear, as by the warning in this case, there is not any room for such presumption: and he held, that the notice to the servant usually employed by the plaintiff in his trade was sufficient notice to the master.

If the wife elope from her husband, and live in adultery, the husband cannot be charged by her contracts:

In an action for meat, &c. provided for defendant's wife^a, the defendant proved, that she went away from him with an adulterer; Raymond, C. J. held that the husband should not be charged, though the plaintiff had not any notice; and, he said, Holt C. J. always ruled it so.

And, although the husband has been the aggressor, by living in adultery with another woman, and although he turned his wife out of doors at a time when there was not any imputation on her conduct, yet if she afterwards commit adultery, the husband is not bound to receive or support her after that time, nor is he liable for necessaries, which may have been provided for her after that time^b. So where the husband turns his wife out of doors, on account of her having committed adultery under his roof^c, he is not liable for necessaries furnished to her after the expulsion.

So if a woman elopes from her husband, though she does not go away with an adulterer, or in an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound^d.

If the wife, with the consent of her husband, lives apart from him, and has a separate maintenance, and contracts debts for necessaries during the separation, the law will presume that she is trusted on her own credit, although the tradesman had not any notice of the separation at the time of the contract; if it were the general reputation of the place where the husband lived, that he and his wife were living apart:

The plaintiff brought an action against the defendant^e, a clergyman, who resided in the country, for medicines provided for the wife of the defendant, during her residence in London. It appeared, that the defendant and his wife, having disagreed, had separated by consent for five years, and

^a Morris v. Martin, Str. 647. See also Mainwaring v. Sands, Str. 706. S. P.

^b Govier v. Hancock, 6 T. R. 603.

^c Ham v. Toovey, Middx. Sittings,

June 24, 47 G. 3. C. B. Sp. J. Sir James Mansfield, C. J. MSS.

^d Child v. Hardyman, Str. 875. per Lord Raymond C. J.

^e Todd v. Stokes, Lord Raymond, 444. and Salk. 116.

that upon the separation, the defendant had signed an agreement with certain trustees, by which he obliged himself to allow his wife twenty pounds a-year, which he had done accordingly. The plaintiff did not know at the time when he furnished the wife with the medicines, that she was a married woman. It was ruled by Holt C. J. that the defendant was not liable; for, though the plaintiff had not any personal notice of the separation, and though it was not the general reputation in London, where the plaintiff lived, that the defendant and his wife were separated, yet, since it was the general reputation in the place where the defendant lived, and that for five years past, it was enough to prevent the wife from charging the husband, even for necessaries. Plaintiff nonsuited (5).

Assumpsit for the board and lodging of the defendant's wife: plea, *non assumpsit*. Lord Mansfield, in his charge to the jury, laid it down as clear and decided law, that when husband and wife live together, the husband is answerable for all such necessaries wherewith the wife may have been furnished; but that what are or are not necessaries, must depend on the rank and situation of the husband. That where they live separate, the person who gives credit to the wife is to be considered as standing in her place, inasmuch as the husband is bound to maintain her; and the spiritual court, or a court of equity, will compel him to grant her an adequate alimony. But if she elope from her husband, and live in adultery; or if, upon separation, the husband agrees to make her a sufficient allowance, *and pays it*; in either of those cases, the husband is not liable; because, in the former case, she forfeits all title to alimony; and, in the latter, has no further demands on her husband. And as in all cases the creditor is to be considered as standing in the wife's place, it imports him, when the wife lives apart from her husband, to make strict inquiry as to the terms of separation; for, in such cases, he must trust her at

s Ozard v. Darnford, B. R. Middx. Sittings, after M. T. 20 G. 3. MSS.

(5) "If the husband gives express notice to a tradesman not to trust his wife, he shall not be charged; and if a tradesman has notice of a separate maintenance being allowed to the wife, that, according to Holt C. J. shall be notice of dissent on the part of the husband, and he shall not be charged; but where the demand is for necessaries, it is incumbent on the husband to shew that the tradesman had notice of the separate maintenance." Per Ld Eldon C. J. in *Rawlins v. Vandyke*, 3 Esp. N. P. C. 250.

his peril. In the present case the defendant and his wife had separated, and he had agreed to make her an allowance, but had never paid it; the jury, therefore, under his lordship's directions, found a verdict for the plaintiff. N. In a similar case of *Turner and Winter*, his lordship nonsuited the plaintiff, because on separation the defendant had agreed to make an allowance to his wife, and had regularly paid it; notwithstanding the plaintiff had no notice of the transaction.

But a mere agreement for a separate allowance, without payment is not sufficient to exempt the husband from this liability:

Husband and wife having agreed to separate^a, a deed of separation was executed, (between the husband on the first part, his wife on the second part, and a trustee, the sister of the wife, on the third part) wherein the husband covenanted with the trustee, to pay the wife, during the separation, a weekly allowance; which she agreed to accept, in full satisfaction of her maintenance, provided that if the husband should pay any debt which his wife, during the separation and payment of the annuity, should contract, it should be lawful for him to withhold payment of the weekly allowance, until he should be reimbursed: the wife, upon the separation, went to live with the trustee, who supplied her with necessaries; the husband having failed to pay the weekly allowance, the trustee brought an action of *indebitatus assumpsit* against him for the amount of the necessaries; it was holden by Chambre, Rooke, and Heath, Js. that, although the trustee had another remedy, and might have brought an action on the deed, yet assumpsit was maintainable, on the ground that there was a common law obligation on the husband to provide necessaries for his wife, although she lived apart from him; that where the law imposed a duty, it raised a promise on the part of the person on whom it was imposed to discharge it; and that the mere covenant, *without payment*, was not sufficient to exempt the husband from this liability. Sir J. Mansfield C. J. expressed an elaborate opinion to the contrary, observing, that a general provision for the separate maintenance of the wife, whether the husband paid it or not, deprived the wife of the advantage of the common law, and prevented the husband from being sued either in assumpsit or debt for necessaries furnished to his wife.

Where a husband by bringing another woman under

^a *Nurse v. Craig*, H. 46 G. 3. C. B. 2 Bos. & Pul. N. R. 148.

his roof renders his house unfit for the residence of his wife, who thereupon removes and lives apart from him, the husband is bound to provide the wife with necessities: e. g. medicines in sickness^t, during the separation.

If the husband causelessly turns^u away his wife, or if the wife, having been absent from home, returns, and he shuts his doors against her^x; and afterwards she contracts debts for necessities, the husband will be liable; for he sends with her credit for her reasonable expenses. But if the husband turns away his wife on account of her having committed adultery, then he will not be liable^y.

The following note of Boulton v. Prentice, which was obligingly extracted by Mr. Ford from his father's MS. at the request of the compiler, may be acceptable to the reader.

Assumpsit for goods sold and delivered to deft.'s wife^z. Verdict for plt. On motion for a new trial, it appeared that deft. and his wife had formerly lodged at plt.'s house, during which time the deft. had given plt. express notice not to trust deft.'s wife. Afterwards deft. and his wife went to lodge at another place, where deft. used his wife ill, after which they separated, and deft. refused to receive her again (6); she desired him to maintain her and offered to return and cohabit with him, which he refused, and struck her; and declared that if any persons trusted her, or gave her credit, he would not pay them; she had not any clothes and was wholly destitute of necessities. The goods furnished to her by plt. were necessities and suitable to the condition of the wife. On the part of the deft. it was proved, that deft.'s wife used

^t Aldis v. Chapman, Middx. Sittings, after Trin. T. 50 G. 3. Ld. Ellenborough C. J.

^u Lungworthy v. Hockmore, per Holt C. J. Lord Raym. 444. and per Holt C. J. in Etherington v. Parrot, Salk. 118.

^x Thompson v. Harvey, 4 Burr. 2177.

^y Ham v. Teovey, ante p. 246.

^z Boulton v. Prentice, from Mr. Ford's MS. Note. S. C. shortly reported in Str. 1214.

(6) "My conception of the law is this, that if a man will not receive his wife into his house, he turns her out of doors; and if he does so, he sends with her credit for her reasonable expenses." Per Lord Eldon C. J. in Rawlins v. Vandyke, 3 Esp. N. P. C. 251.—"Where a wife's situation in her husband's house is rendered unsafe from his cruelty or ill treatment, I shall rule it to be equivalent to a turning her out of the house, and that the husband shall be liable for necessities furnished to her under those circumstances." Per Lord Kenyon C. J. in Hodges v. Hodges, 1 Esp. N. P. C. 441.

to pawn her clothes, and was addicted to drinking, that plt. had assisted her in pawning her watch, and that deft. a year before they parted had expressly forbidden plt. from trusting deft.'s wife. The foundation of moving for a new trial was, that the verdict was contrary to law, as the credit given to the wife is in law grounded on the supposed assent of the husband, which assent cannot be supposed where, as in this case, there is an express prohibition. But it was answered, and so resolved by the court, that, although the prohibition took effect and continued in force during the cohabitation, yet such prohibition could not, after the cohabitation ceased, either extinguish or lessen the credit to which the wife was by law entitled, after the husband had turned her away and refused to maintain her; for the husband, by such conduct, gave his wife such a general credit as amounted to a revocation of the prohibition. If the husband in a case of this kind could prohibit one person from trusting his wife, he might *pari ratione* prohibit many; and this might be extended so far as to deprive the wife from obtaining any credit whatsoever, so that particular prohibitions might amount to a total prohibition. If a wife leaves her husband, he is not in that case answerable for her contracts; it is the cohabitation which is considered as the evidence of the husband's assent to the contracts made by his wife for necessities; but if the husband during the cohabitation declares his dissent, by forbidding any person to trust his wife, all persons who have notice of such dissent trust the wife at their peril. The husband is only liable on account of the implied assent to the contracts of the wife, of which assent the cohabitation afterwards induces a presumption, and when he declares the contrary, there is not any longer room for such presumption. But if a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessities which have been provided for her.

Another leading case on this subject is the case of *Mauby v. Scott*^a: there the wife of the defendant went away from him without his consent. During the separation, the husband, who did not allow the wife any maintenance, expressly forbade the plaintiff to deliver any goods to his wife; notwithstanding which, the plaintiff sold to the wife silks and velvets, and then brought an action against the husband for the value of the goods. At the trial, the jury found that the goods were suitable to the degree of the husband. After three arguments in the Court of King's Bench, the

^a *Mauby v. Scott*, 1 Lev. 4. and 1 Sidf. 109.

Judges were divided, whereupon the case was adjourned into the Exchequer, where nine of the judges (among whom was Hale Chief Baron) (7) were of opinion, that the husband was not chargeable.

If a man cohabits with a woman^b, to whom he is not married, and permits her to assume his name, and appear to the world as his wife, and in that character to contract debts for necessaries, he will become liable, although the creditor be acquainted with her real situation; for here a like assent will be implied, as in the case of husband and wife.

In an action for the use and occupation of apartments by the deft.'s wife^c, it appeared, that the apartments had been occupied by a lady, who went by the deft.'s name, and who had actually been married to him. The defence attempted to be set up was, that the deft. had a former wife then and still living. But Lord Ellenborough C. J. said, that there was not any evidence to fix the plt. with a knowledge of the celebration of the first marriage, and that the deft. was estopped to set up bigamy as a bar to the action. He had given the woman who lodged with the plt. every appearance of being his wife. By his misconduct in marrying a second wife, while his first was still alive, he had done what he could to confer the rights of marriage upon both, and had incurred a civil as well as a criminal responsibility.

3. *In respect of Children of the Wife by a former Husband*.—If a man marries a woman having children by a former husband, he is not bound by the act of marriage to maintain such children^d: but if he holds them out to the world as

^b Watson v. Threlkeld, 2 Esp. N. P. C. 637. Kenyon C. J. ^d Tubb v. Harrison, 4 T. R. 118. recognized in Cooper v. Martin, 4 East, 76.
^c Robinson v. Nation, 1 Camp. N. P. C. 245.

(7) See Hale's argument, Bac. Abr. Baron and Feme, H. Twisden J. having delivered an opinion in the King's Bench in favour of the plaintiff, changed it afterwards, and agreed in opinion with the majority of the judges in the Exchequer. See 1 Sidf. 119. The argument of Mr. J. Hyde will be found at great length in 1 Mod. 124.

It will be remarked, that in this case an express prohibition had been given to the plaintiff not to trust the wife; but it was agreed by all the judges, that if the prohibition had been general, it would have been void. 1 Sidf. 127. In like manner, it is incumbent on persons dissolving a partnership to give express notice of such dissolution to all persons with whom they have had dealings in partnership. Peake's N. P. C. 155.

part of his family, he will be considered as standing in *loco parentis*, and liable even on a contract made by his wife during his absence abroad, for the maintenance and education of such children^e (8).

See *Rawlyns v. Vandyke*, 3 Esp. N. P. C. 252. Lord Eldon's opinion as to how far a father is liable for necessities furnished to his children, living with the mother apart from the father (9).

II. *In what Cases a Feme Covert may be considered as a Feme Sole.*

It will be proper to remark in the first place, that it is now clearly established, notwithstanding former decisions^f to the contrary, that a feme covert cannot bring an action or be impleaded as a feme sole, while the relation of marriage subsists, and she and her husband are living in this kingdom, notwithstanding she lives separately from her husband, and has a separate maintenance secured to her by deed.

This point was solemnly determined (after two arguments before the judges in the Exchequer Chamber) in *Marshall v. Rutton*, 8 T. R. 545.

It is, however, observable, that the policy of the law which has considered a married woman as incapable of suing, or being sued, without her husband, admits of some modification from particular circumstances:

^e *Stone v. Carr*, 3 Esp. N. P. C. 1.
Kenyon C. J.

^f *Ringstead v. Lady Lanesborough*,
Cooke, B. L. *Barwell v. Brooks*
and *Corbett v. Poelnitz*, 1 T. R. 5.

(8) Maintenance by the second husband of the children of wife by former husband, is a good consideration for a promise by such children, when they come of age, to repay the expense of their maintenance. *Cooper v. Martin*, 4 East's R. 76.

(9) The father of a bastard child is liable for its nursing and board, if he adopts it as his own, although an order of filiation has not been made on him. *Heskett v. Gowing*, 5 Esp. N. P. C. 131.

1. By the custom of the city of London, (10) a feme covert being a sole trader, may sue or be sued in the city courts as a feme sole, with reference to her transactions in London, but even there the husband must be made a party to the suit for conformity.

A feme covert, sole trader in the city of London, cannot sue^g, or be sued^h, in the courts at Westminster without her husband.

2. A wife may acquire a separate character by the civil death of her husband, by exileⁱ, and formerly by profession and abjuration of the realm (11).

3. Where the husband had been transported for a term of years, before the expiration of which the debt was con-

g Cawdell v. Shaw, 4 T. R. 361.

h Beard v. Webb, 2 Bos. & Pul. 93.

i Belknap's case, 2 H. 4. 7 a. it appears by the year book, 1 H. 4. 1 a. that

Belknap was banished to Gascony, there to remain until he attained the King's favour, which Sir E. Coke considered as a banishment for ever.

(10) By the custom of London, "A feme sole merchant is, where the feme trades by herself in one trade in which her husband does not intermeddle, and buys and sells in that trade; then the feme shall be sued, and the husband named only for conformity, and if judgment be given against them, execution shall be against the feme only." Langham v. Bewett, Cro. Car. 68. "This custom is one of those customs called executory customs, the meaning of which expression is, customs united to the courts of the city of London. They are pleadable in London, and not elsewhere, except so far as they may be made use of in the superior courts by way of bar." Per Lord Eldon C. J. delivering the judgment of the court in Beard v. Webb, in error, Exchequer Chamber, 2 Bos. and Pul. 98. The judgment here referred to is very elaborate, and contains much useful information on this subject.

(11) See 1 Inst. 133 a. where Sir Edward Coke says, "that an abjuration, that is, a deportation for ever into a foreign land like to profession, is a civil death; and *that is the reason* that the wife may bring an action, or may be impleaded, during the natural life of her husband. And so it is, if by act of parliament the husband be attainted of treason or felony, and saving his life, is *banished for ever*, as Belknap, &c. was; *this is a civil death*, and the wife may sue as a feme sole. But if the husband by act of parliament, have judgment to be exiled *for a time*, which some call a relegation, that is not a civil death. Every person who is attainted of high treason, petit treason, or felony, is disabled to bring any action; for he is *extra legem positus*, and is accounted in law *civiliter mortuus*." 1 Inst. 130. a.

tracted, and sued for; Yates J. thought that the transportation suspended the disability of the wife, and that she might be sued as a feme sole^k.

The following observations, which were made by Lord Eldon^l, on the preceding case, are worthy of great consideration. His lordship having said, that in the cases of abjuration, profession, &c. which amounted to a civil death, he thought he understood the situation in which the wife was placed, for the fiction of law, which considered the husband as civilly dead, put the wife in the same situation as if he were actually dead; then proceeded to observe that, "transportation for a term of years might give rise to many difficulties with respect to the enjoyment of the husband's estate, both real and personal; but, besides the difficulties which might arise during the term of transportation, another difficulty of equal importance occurred, where the wife had contracted debts after the period of her husband's transportation had elapsed, but before his actual return to his country. In the case of *Sparrow v. Carruthers*, Mr. Justice Yates seemed to have treated it as a material circumstance in evidence, that the time of transportation was not expired, and he did not give any opinion as to what would have been the situation of the parties, if it had been expired. The court could not presume to say how Mr. Justice Yates would have decided, had the husband continued to reside abroad, after the period of his transportation had expired, or had only remained there to arrange his affairs, with a view of returning to his country when he had so done."

Since the preceding observations were made, the following case was decided at Nisi Prius in 1801:

In assumpsit for goods sold and delivered^m, the defence was, that the plaintiff was a married woman. The plaintiff's counsel answered this case by producing the record of the husband's conviction for felony in March, 1794, and of a sentence of transportation for seven years; whereupon it was insisted, on the part of the defendant, that the sentence being for seven years, from March, 1794, that time was now expired, so that the husband was competent to sue. But Lord Alvanley C. J. said, that by the record of the conviction and sentence, there was conclusive evidence to support the right of action in the plaintiff as a feme sole,

^k *Sparrow v. Carruthers*, cited in *Lean v. Shutz*, 2 Bl. R. 1197. and in *Corbett v. Poelnitz*, 1 T. R. 7.

^l *Marsh v. Hutchinson*, 2 Bos. & Pul. 231.

^m *Carrol v. Blencow*, June 3, 1801, Sittings after East. T. C. B. coram Alvanley, C. J. 4 Esp. N. P. C. 27.

And though the term of his transportation had expired, if in fact he had not returned, the right of action remained; but that, if the defendant meant to rely on the circumstance of the husband having returned, the proof of that lay on the defendant. Evidence to this effect not being offered, the plaintiff had a verdict.

4. Where the husband is an alien, who has deserted this kingdom, leaving his wife to act here as a feme sole, the wife may be charged as a feme sole for contracts made after such desertion.

In assumpsit for goods sold and delivered^a, the defendant pleaded that she was covert of the Duke de Pienne. It appeared in evidence, that the duke, who was an alien, had gone abroad in the year 1793, with an intention to return in four months, but had not returned; during his absence the defendant had kept house, and paid bills on her own account and in her own name.

Lord Kenyon C. J. said, this case came within the principle of the common law, where the husband had abjured the realm. If the husband had been absent for some time, and then returned, and paid bills contracted by the wife in his absence, and again left the kingdom, he should hold the defendant not liable; *but here was a desertion of the kingdom*, and an absence of some years; he was no longer domiciled here, and, *in the interval*, the wife was supplied with those articles; if she was not to be held liable for debts contracted under such circumstances, she might starve. See also *Francks v. Duchess de Pienne*, 2 Esp. N. P. C. 587. to the same effect.

In *De Gaillon v. Victoire Harel L'Aigle*, 1 Bos. & Pul. 357. where the replication to a plea of coverture was, that the husband resided abroad (not stating him to be an alien), and that the defendant lived separate from him in this kingdom, that she traded as a feme sole, and plaintiff did not give credit to the husband, but traded with the defendant as a feme sole, and on her credit; the court held the wife chargeable as a feme sole. But it is conceived, that since the case of *Marsh v. Hutchinson*, 2 Bos. & Pul. 226, such a replication could not be supported, unless it appeared that the husband was an alien (12).

^a *Walford v. Duchess De Pienne*, June 7, 1797, Middlesex Sittings, 2 Esp. N. P. C. 554.

(12) "There is a great difference between the cases of an Englishman residing abroad, leaving his wife in this country, and of a

The case of *Marsh v. Hutchinson*, was an action for goods sold and delivered; the defence, coverture. The defendant's husband was an Englishman, who, about 10 years before this action was brought, had purchased the appointment of agent for the English packets, at the Brill, in Holland, and had resided there ever since. During that period, he became possessed of madder grounds, from the cultivation of which he derived considerable profit. On the irruption of the French into Holland, in 1795, his employment as agent having ceased, he sent the defendant, together with his family, to reside in England, but he remained in Holland to look after his madder grounds, and with a view to recover his situation, in case the intercourse between England and Holland should be re-established. The defendant lived at Aylsham, in Norfolk, and was there considered to be a married woman. The plaintiff had furnished her with coals, for the value of which this action was brought. It was holden, under these circumstances, that the husband's residence in Holland did not enable the wife to bind herself by her own contracts.

So where to a plea of coverture^o the plaintiff replied, that the defendant's husband "lived and *resided* in Ireland, and that the defendant lived in this kingdom separate from her husband as a single woman, and as such single woman, promised, &c.;" the replication was holden bad on general demurrer, because the terms of it were perfectly consistent with a mere temporary absence, and they might be applied to the case of every man, who went for a short time to live in Ireland or Scotland, and whose wife in the mean time contracted debts here.

To trespass for breaking and entering the plaintiff's dwelling-house and shop^r on the 8th April, 1807, and on divers other days, &c. and ejecting her from the possession thereof; defendant pleaded, that plaintiff, at the time of committing the trespasses, and thence continually, hitherto hath been;

• *Farrer v. Countess of Granard*, 1 Bos. and Pul. N. R. 80. p *Boggett v. Frier*, B. R. Trin. T. 1809. 11 East, 301.

foreigner so doing. The former may be compelled to return at any time by the king's privy seal. There is not any case in which the wife has been holden liable, the husband being an Englishman." Per Heath, J. in *Marsh v. Hutchinson*. See also *Farrer v. Countess of Granard*, 1 Bos. and Pul. N. R. 80, where Heath, J. said, the case of *De Gaillon v. L'Aigle* proceeded much upon the ground of the defendant's husband being a foreigner.

and still is, under coverture, of one Jos. Boggett, then and still her husband, and still alive. Replication, that before the committing the trespasses, the husband deserted and left plaintiff, and departed out of this kingdom to parts beyond the seas, viz. to America, without leaving any means of necessary provision and support to plaintiff; and from the time of his departure hitherto, has not returned to this country, nor corresponded with or been heard of by plaintiff; and that during all that time, plaintiff has lived apart from her husband, and made contracts, and obtained credit as a single woman; and for her necessary support and maintenance, has, during all that time, carried on the business of a merchant, as a single woman and sole trader, and as such was lawfully possessed of said dwelling-house and shop. Rejoinder, that the husband was born within this realm, and from the time of his nativity hitherto, has been and still is a subject of our lord the king, and that he has not at any time hitherto abjured this realm, or been exiled or banished, or relegated therefrom. On demurrer, the court listened reluctantly to the argument in support of the replication, and gave judgment for the defendant on the authority of the preceding cases, observing, that the rule had been laid down in *Marshall v. Rutton*; it was capable of having exceptions engrafted on it, as where the absence is tantamount to a civil death, &c.; but that a temporary absence of the husband not banished, or the like, had never been deemed sufficient.

III. *Of Actions by Husband and Wife.*

1. *Where the Husband and Wife must join.*
2. *Where the Husband must sue alone.*
3. *Where the Husband and Wife may join, or the Husband may sue alone at his Election.*

1. *Where the Husband and Wife must join.*—In real actions for the recovery of lands of the wife, the husband and wife must join^a.

So in an action of waste, for waste committed on the land of the wife^b.

So in detinue of charters of the wife's inheritance^c.

^a 1 Balst. 21.

^b 7 H. 4. 15 a. 3 H. 6. 53.

^c 1 Rol Abr. 347. (R.) pl. 1.

In an action on a bond given to wife *dum sola*, husband and wife must join (13).

(13) I am not aware of any solemn adjudication on this point, but the position is supported by the following authorities:

1. In *Fenner v. Plaskett*, Moor. 422.* it is said, that for a debt due to the wife *dum sola*, husband and wife *ought* to join; but it is observable, that in Croke's report of this case, (Cro. Eliz. 459.) which is more full and accurate than Moor's, this dictum does not appear.

2. In 1 Roll. Abr. 347. (R.) pl. 3. it is laid down, that husband and wife *ought* to join in actions due to the wife before coverture; but there is not any authority cited.

3. Lord Hardwicke C. in *Garforth v. Bradley*, 2 Vez. 676, 677. takes a distinction between choses in action, vesting in the wife before and after marriage, and confines the power of the husband to sue alone to those which vest during the coverture.

4. In Buller's N. P. 179. it is laid down, that a debt due to a man, in right of his wife, cannot be set-off in an action against him on his own bond; cites *Paynter v. Walker*, C. B. R. 4 G. 3.

5. Lord Kenyon C. J. delivering the judgment of the court in *Milner v. Milnes*, 3 T. R. 631. said, "It is extremely clear on the one hand, that the marriage gives to the husband all the personal estate which the wife has in possession; it is also clear on the other hand, that where a chose in action of the wife is to be reduced into possession, and it is necessary to bring an action for that purpose, it *must* be brought in the names of both husband and wife." It may be observed, on this last case, (which was an action of trespass brought by a feme covert, without her husband, for an injury done to a personal chattel of the wife *dum sola*; to which, coverture of the plaintiff at the time of exhibiting the bill was pleaded in bar) that it was not necessary for the determination of this case to decide, that the action must be brought by husband and wife. It was only necessary to decide, in the first place, that the wife could not sue alone, upon which point there could not be any doubt, as the wife cannot in any of these cases sue alone; and 2dly, whether advantage could be taken of the wife suing alone by a plea in abatement, or a plea in bar; the question whether the husband might sue alone, was wholly irrelevant. It may be proper to add, that the court were of opinion, that the plea ought to have been in abatement.

6. This question was raised, but not decided, in a late case of *Carr v. Taylor*, 10 Ves. jun. 578. before Sir W. Grant, M. R. who said, that there had been some doubt upon it at law.

I cannot conclude this note without observing, that, until the doubts which hang over this question are removed by a solemn adjudication, the best way of proceeding for the recovery of a chose

* Cited by the court in *Weller v. Baker*, 8 Wils. 422.

If an action is brought in respect of a personal wrong to the wife, as for the battery of the wife, the husband and wife must join (14); and the declaration ought to conclude "to their damage," and not "to the damage of the husband"; for the damages will survive to the wife, if the husband die before they are received.

t Horton v. Byles, 1 Sidf. 387.
a Judgment arrested for this conclu-

sion, in Newton & Ux. v. Hatter,
Lord Raym. 1208.

in action of wife *dam sola*, is to bring the actions in the names of husband and wife, on the propriety of which method a question cannot be raised.

(14) But in these cases the husband may sue alone for the injury sustained by himself from the loss of the society, comfort, and assistance of his wife, in consequence of the battery; *Hyde v. Scissor*, Cro. Jac. 538. And if the husband adopts this method, he may in the same declaration complain of a battery to himself. *Guy v. Livesey*, Cro. Jac. 501. Although the wife ought not to be joined in an action with the husband for the battery of the husband, (*Newton v. Hatter*, Lord Raym. 1208.) yet, where husband and wife join in an action for a personal wrong to the wife, the husband may declare also for an injury arising solely to himself *by way of aggravation of damages*; as, where in trespass by husband and wife, for false imprisonment of the wife, *per quod negotia domestica of the husband remanserunt infecta ad grave damnum ipsorum*. On motion, in arrest of judgment, the declaration was holden good; for although the husband and wife could not have declared jointly for the special damage resulting to the husband alone, if such damage had been the gist of the action, yet in this case, it having been laid for *aggravation of damages* only, the action was well brought; for trespass will lie for a matter jointly with other matters, for which singly an action could not have been maintained; as trespass will lie for entering the plaintiff's house, and *beating his servant*, without adding, "*per quod servitium amisit*"; for then it is considered as a continuation of the first trespass. *Russell v. Corne*, Ld. Raym. 1031. Salk. 119. 6 Mod. 127. S. C. So where in an action of assault and battery by husband and wife, it was stated in the declaration, that the defendant assaulted the wife, and driving a coach over, bruised her; and "*by reason thereof*," the husband laid out divers sums of money in the cure, &c. After verdict for plaintiff, with entire damages, it was holden, on motion in arrest of judgment, that the gist of the action was the beating of the wife, and the expenses incurred by the husband were only in aggravation of damages: and Powell J. observed, that if these had been omitted in the declaration, yet the surgeon's bill might have been given in evidence, in aggravation of damages. *Todd v. Redford*, 11 Mod. 264. See also *Dix v. Brookes*, Str. 61.

2. *Where the Husband must sue alone.*—Where the wife cannot maintain an action for the same cause, if she survive her husband, the action must be brought by the husband alone; as in the case of an action of *indebitatus assumpsit* for the labour, &c. of the wife, during the coverture²; for, in contemplation of law, the wife is considered as the servant of the husband, and he is entitled to her earnings, and such earnings shall not survive to the wife, but go to the personal representative of the husband (15).

So in an action on the case for words⁷, not actionable in themselves, spoken of the wife, whereby the husband sustains special damage, the husband must sue alone. So in actions for injuries committed during coverture to personal chattels², which by law are vested in the husband; as in trespass for cutting down and carrying away corn, although it grew upon the wife's land: for it grows by the industry of man, and consequently the property thereof is in the husband alone (16).

In all cases where the wife shall not have the thing^a, when

x Buckley v. Collier, Salk. 114. and Carth. 251.

z Arundel v. Short, Cro. Eliz. 133.
a 1 Rol. Abr. 347. (Q) pl. 5.

y Coleman v. Harcourt, 1 Lev. 140.

(15) It may here be observed, that, although the law will not imply a promise to the wife, yet where the wife is the meritorious cause of the action, that is, where the defendant has derived profit or advantage from her labour or skill, and an *express* promise of remuneration is made by the defendant *to the wife*, if, in such case, an action is brought by the husband and wife jointly, and it is expressly stated in the declaration, that the promise was made to the wife, an objection cannot be raised to such declaration, merely on the ground of the wife having been joined; because contracts made by the wife, with the assent of the husband, are valid, and the bringing the action in their joint names is a declaration of such assent; and in this case the action would survive to the wife, *Brashford v. Buckingham*, in error, Cro. Jac. 77. 205. Care, however, must be taken, that the declaration does not embrace any other cause of action accruing to the husband alone; for if it does, it will be bad. *Holmes and wife v. Wood*, cited by the court in *Weller v. Baker*, 2 Wils. 424.

(16) Husband and wife being seised of land in right of wife, may join in trespass, *quare cl. fregit, et herbam ibidem crescentem consumpsit et asportavit*, because the grass is the natural produce of the earth, and shall continually go with the land. *Willy v. Hanksworth*, B. R. M. 3 G. 2. MSS. and cited by the court in *Weller v. Baker*, 2 Wils. 424.

it is recovered, either solely to herself, or jointly with her husband, but the husband only shall have it, there the husband shall sue alone.

An action on the case was brought by A. and B. his wife^b, for the use and occupation of a messuage and lands, and for money had and received to the use of the husband and wife, stating the promises to husband and wife; after judgment by default, writ of inquiry executed, and final judgment in B. R. a writ of error was brought in the Exchequer Chamber, assigning for error, that judgment was given for the husband and wife to recover their damages, whereas it appeared on the record, that B. was the wife of A. and could not sustain any damage by reason of any thing contained in the declaration; the court were of opinion, that the judgment was erroneous, because a contract could not be made with a married woman; that a promise, either express or implied, did not give any interest to her; the whole resulted to the husband, and the action ought to have been brought in his name (17). The counsel for the defendants in error having urged, that, if an impossible assumpsit was stated in the declaration, it might quoad her be surplusage, as much as if she had been a stranger; the court said, the insertion of the wife could not be surplusage; for it created an interest in her, and entitled her to damages by survivorship.

Where a debtor to the wife as executrix promises to pay the husband in consideration of his giving time of payment, the husband ought to sue alone, because the wife is not a party to the agreement between her husband and the defendant^c; but in this case the life of the wife must be averred^d. N. The recovery of the husband will amount to a *devastavit pro tanto*. Per Holt C. J. Carth. 463.

3. *Where the Husband and Wife may join, or the Husband may sue alone at his Election.*—In personal actions for the recovery of damages only (other than actions in respect of personal wrongs to the wife,) where the action will sur-

^b Bidgood v. Way and Wife, on error, in Exchequer Chamber, 2 Bl. R. 1236. cited in Morris v. Norfolk, 1 Taunt. 214. ^c Yard v. Eland, Lord Raym. 368. Salk. 117, Carth. 462. S. C. ^d Lea v. Minne, Yelv. 84. Cro. Jac. 110.

(17) Lord Ellenborough C. J. speaking of this report in Ord v. Fenwick, 3 East's R. 106. said that the declaration was not stated sufficiently explicit; that it did not appear *whose* lands had been used and occupied, whether the husband's or wife's.

vive to the wife (18), the husband and wife may join^e; or the husband may sue alone, for he alone may release such action (19).

Assumpsit.—In an action for a breach of promise made to husband and wife after coverture, to pay a sum of money to the wife, husband and wife may join^f.

So where a promise is made to the wife only^g.

Covenant.—Where a lease is granted to husband and wife for a term of years, and the lessor ousts them, husband and wife may join in an action of covenant^h.

Queen Elizabeth, by letters patent, demised a house to A. for years, who covenanted to repairⁱ, and afterwards, during the term, the queen granted the reversion to husband and wife, and to the heirs of the husband in fee; the house being out of repair, the husband alone brought covenant, and it was holden well, although the interest of the feme appeared on the face of the declaration (20).

Covenant will lie by husband and wife for nonpayment of rent, due by virtue of a lease granted by husband and wife of lands, the inheritance of wife^k.

Husband alone may bring an action on a covenant made to himself and his wife, for, although the covenant be made to both, yet he may refuse quoad her^l.

In this case North C. J. said, that he remembered an authority in an old book, that, if a bond be given to baron and feme, the husband shall bring the action alone, which shall be looked upon to be his refusal as to her^m.

^e Per Cur. 2 Mod. 270.

^f Hilliard v. Hambridge, Aleyn, 36.

^g Prat v. Taylor, Cro. Eliz. 61. 1 Rol. Abr. 32. pl. 12.

^h Bro. Abr. Baron and Feme, pl. 23.

ⁱ Brett v. Cumberland, Cro. Jac. 399. Bulst. 163. S. C.

^k Aleberry v. Walby, Str. 230.

^l Beaver v. Lane, 2 Mod. 217.

^m Cited by Buller J. 4 T. R. 617.

(18) In *Frosdike v. Sterling*, 1 Freem. 236. North C. J. said, "that he always took it for an unquestionable rule, that, wheresoever, in case the husband should die, the action would survive to the wife; there the wife *might* join, but on the other side, the husband may join the wife in many cases where he is not bound to join her, but may have the action alone."

(19) "What the husband alone may discharge, and of which he may make disposition to his own use, he may recover alone without joining his wife in the action." Per Dodderidge J. to which Coke C. J. assented, and said it was a true and good ground, 3 Bulst. 164.

(20) But see *Middlemore v. Goodall*, Cro. Car. 505.

Debt.—So if a bond be given to husband and wife administratrix^a, husband may sue alone, declaring on it as a bond to himself.

In debt on bond made to husband and wife^o both may join; or the husband may disagree to the wife's right to the bond^p, and bring the action in his own name only; but, until such disagreement, the right to the bond is in both the husband and wife, and shall survive; hence, if the husband dies, the wife shall have the bond, and not the personal representative^q of the husband.

So in debt on bond made to the wife *during* coverture, husband and wife may join; or husband may sue alone^r (21).

Where husband and wife have recovered judgment on a bond made to wife, *dum sola*, husband and wife may join in an action^s on such judgment; or husband may sue alone; for that which was before a chose in action, *transit in rem judicatam*, and is of another nature from what it was before the coverture.

If it be referred to a master in chancery to take an account of what is due to husband and wife^t, who reports the sum due, and appoints it to be paid to the husband, and the defendant is committed for non-payment, and escapes, the husband and wife may join in an action against the warden for the escape.

Quare impedit.—So where a right of presentation is in the husband *jure uxoris*, a *quare impedit* may be brought by the husband and wife jointly^u:

Or the husband may sue alone^v, for the presentation only is recoverable and not the advowson, and the release of the husband would bar the action.

Replevin.—Baron and feme may be joined in the same

^a Ankerstein v. Clarke, 4 T. R. 616.
^o 39 E. 3. 5. 43 E. 3. 10. Bro. Baron and Feme, pl. 14. 55.

^p Coppin v. — 2 P. Wms. 497.

^q Bro. Baron and Feme, pl. 60.

^r Howell v. Maine, 3 Lev. 403.

^s Woolverton v. Fynnimore, T. 18 & 19 G. 2. C. B. MSS.

^t Huggins v. Durham, Str. 796.

^u Bro. Bar. and Feme, pl. 41.

^x Id. pl. 98.

(21) It appears by a MS. note in the possession of a friend of the compiler, that the roll in Howell v. Maine was searched, and it was found that the bond was given to the wife *during* the coverture; for *devant*, therefore, in some editions of Levinz's report, read *durant*. Comyns has stated the case accurately in his Digest, tit. Baron and Feme. (w)

declaration in replevin for goods distrained from the *feme dum sola*^y.

If the goods of a feme sole be taken, and she marries, the husband alone may sue the replevin^z.

In the replevin of goods which the wife has as executrix, husband and wife shall join, *ut videtur*^a.

Avowry for rent arrear *jure uxoris* may be by husband and wife, or husband only, averring the life of feme^b.

Tort.—In an action upon the case for stopping a way to the land of the wife, husband and wife may join^c.

So an action upon the case for cutting down trees^d, the lops of which were reserved to the wife for her life, may be brought by husband and wife jointly.

In *Weller and wife and others v. Baker*, 2 Wils. 414. an action was brought by the dippers at Tunbridge Wells, together with their husbands, against the defendant for exercising the business of a dipper, not being duly appointed and approved according to a private statute; it was holden, that the action was well brought in the names of the husbands and wives.

Trespass.—Trespass was brought by the husband alone for hunting in a free warren^e, which he had in right of his wife, and it was adjudged good, for damages only are recoverable (22).

Trover.—Where the inception of the cause of action is in the wife before marriage^f, and consummated afterwards, husband and wife may join, as in trover of a personal chattel of wife before, and conversion thereof after marriage.

It must be observed, that, in all the preceding cases,

^y Bro. Baron and Feme, pl. 85.

^z F. N. B. 159. K. cited in Bull. N. P. 53.

^a Bro. Baron and Feme, pl. 85.

^b *Wise v. Bellent*, Cro. Jac. 442. Osborne, v. Walleeden, 1 Mod. 273.

^c Agreed in *Baker and wife v. Brereman*, Cro. Car. 418.

^d *Tregmiell and wife v. Reeve*, Cro. Car. 437.

^e Bro. Abr. Baron and Feme, pl. 16.

^f *Blackburn v. Greaves*, 2 Lev. 107.

(22) It may be remarked here, that it is immaterial as to the point in question, whether the interest of the husband is a joint interest with the wife, or an interest only in right of the wife. In the first and second cases in covenant before abridged, the husband had a joint interest with the wife. In the 4th case in covenant, two first cases in tort, and the case to which this note is annexed, the husband had an interest only in right of his wife.

where the wife is made a party, her interest ought to appear on the face of the declaration, for the court will not intend it upon demurrer^g, or even after verdict, according to the case of *Abbott v. Blofield*, Cro. Jac. 644. Sed quæ. whether this case be law to its full extent, for in *Bourn and wife v. Mattaire*, Bull. N. P. 53. and MSS. where husband and wife joined in replevin, and defendant avowed for rent arrear, after verdict, it was objected, that the husband and wife could not have a joint property in personal chattels after the marriage, and, consequently, the replevin ought to have been brought by the husband alone. Lord Hardwicke C. J. delivering the judgment of the court, said, that, although the ground of the objection was generally true, yet, notwithstanding, as a man and woman might have a joint property before marriage, or the wife might have the goods in question as executrix, and the taking might in both cases be before marriage, the court were of opinion, that they might declare jointly in an action for such taking. That if the law would admit of such joint action, the fact was admitted by the pleading. The defendant had not disputed with the plaintiff to whom the property belonged at the time of the taking, and therefore if there could be a case in which husband might join with the wife in an action for a personal chattel, the court thought that, *after verdict*, (23) this ought to be intended to be the case. Bro. Bar. and Feme, pl. 85. abridges a book case in 33 Edw. 3. (but which is not to be found in the year book, and was probably taken from some manuscript) wherein it is held, that husband and wife may join for such things as the wife has as executrix, or where goods are taken from her whilst sole.

^g *Serres v. Dodd*, 2 N. R. 405. *infra* n. (23.)

(23) Since the publication of the former edition of this work, it has been decided, that a declaration in replevin by husband and wife, where nothing appears on the face of the record whence the court can infer that the wife had an interest in the goods taken, is bad, on special demurrer. *Serres and wife v. Dodd*, 2 N. R. 405.

IV. Of Actions against Husband and Wife.

IN actions against the husband for the debts of the wife contracted before marriage^a, if the wife is not joined, advantage may be taken of the omission in arrest of judgment; and this rule holds, although an account has been stated with the husband^b, for that does not alter the nature of the debt.

As a husband *de facto* is liable to the debts of his wife^c, a plea of *ne unques accouple en loyal matrimonie* to an action brought against husband and wife, for the recovery of debt due from wife before coverture, is bad.

Husband cannot be charged at law for money lent to his wife, even for the purpose of buying necessities; because it may be misapplied (24).

But a count for money lent to the wife at the request of the husband is good^d, because a loan to the wife at the request of the husband is considered in law as a loan to the husband (25).

So where the plaintiff declared, that the defendant was indebted for meat^e, &c. found by the plaintiff at the defendant's request, and on evidence it appeared to be found for the defendant's wife, at his request, in his absence; upon a case reserved, it was holden, that a delivery to the wife, at the husband's request, was in law a delivery to the husband.

^a *Mitchinson v. Hewson*, 7 T. R. 348.

^b *Drue v. Thorne*, Aleyn, 72.

^c *Norwood v. Stevenson*, Andr. 227.

^d *Stevenson v. Hardy*, 2 Wils. 348. 2

Bl. R. 872. S. C.

^e *Ross v. Noel*, C. B. E. 31 G. 2. Bull. N. P. 136.

(24) If the money be laid out in necessities, equity will consider the lender as standing in the place of the person providing the necessities, and decree relief. *Harris v. Lee*, 1 P. Wms. 482. *Preced. in Chan.* 502. S. C. and *Hutchinson v. Staudly*, Lord Bathurst, C. H. T. 1776. MSS.

(25) "It is true that a complete or perfect contract cannot be made by a feme covert by her own authority; yet, by the assent of her husband, she may contract as his substitute, as in case either of sale or loan. This assent may be either express or implied; it may be prior or subsequent to the contract. If prior and communicated to the defendant, the contract made is an actual contract and not merely *virtual* with the husband; if subsequent, then the wife's contract is *inchoate* and *imperfect*, until affirmed by the husband; and such affirmation, if given, transfers the contract to him." Per Blackstone J. in *Stevenson v. Hardie*, 2 Bl. R. 873.

If an action is brought against husband and wife on a bond given by the wife *dum sola*^a, the defendant may plead the bankruptcy of the husband after the intermarriage, &c. as a discharge of the debt. This plea upon the statute must conclude to the contrary. Husband and wife cannot maintain an action of trover, and suppose the possession in them both; for the law will transfer the whole interest to the husband; but trover may be maintained *against* husband and wife^b; for the gist of the action is the conversion, which is a tort, with which a feme covert may be charged as well as with trespass.

Trespass against J. G. widow^c, and pending the suit she took husband; after judgment, a writ was directed to the sheriff *quod caperet J. G. ad satisfaciendum*, upon which the sheriff took J. G. whose husband, together with her, thereupon brought an action for false imprisonment against the sheriff, who justified under the *ca. sa.* On demurrer, the court gave judgment for the defendant, observing, that if an action be brought against a feme, who before judgment takes husband, yet, if she be found guilty, the *ca. sa.* shall be awarded against her, and not against her husband.

In like manner, after interlocutory judgment in assumpsit against a feme^d, who afterwards marries, the plaintiff, even after notice of the marriage, may proceed to final judgment, without joining the husband, and sue out execution thereon against the feme only, and such execution cannot be set aside for irregularity.

Judgment was obtained against a feme sole^e, who afterwards married, and then the plaintiff brought a *sci. fa.* against husband and wife, and had judgment thereon; then the wife died, and the plaintiff afterwards brought another *sci. fa.* against the husband alone: it was holden, on writ of error, that the second *sci. fa.* was well brought, on the ground that the judgment on the first *sci. fa.* had made the husband liable.

If wife be joined in an action for words spoken by husband only, it will be error^f. Hence if slander be spoken by husband *and* wife, there must be separate actions, one

^a Miles v. Williams, 1 P. Wms. 249. said by Lord Hardwicke in 2 Vesey, 181. to be truly reported.

^b Draper v. Fulkes, Yelv. 165.

^c Doyley v. White, Cro. Jac. 323.

^d Cooper v. Hunchin, 4 East's R. 521.

^e Obrian v. Ramm, Carth. 30. See the record, 3 Mod. 170.

^f Swithin v. Vincent, 2 Wils. 227. Dyer, 19 a. pl. 112. in the margin.

against the husband only, for the slander spoken by him' and the other against the husband and wife, for slander spoken by the wife, and the court will not order the actions to be consolidated.

So for words spoken of husband and wife there must be two actions; one by the husband for the words spoken of the husband, and another by husband and wife for the words spoken of the wife^t.

The policy of the common law will not permit husband and wife to give evidence *for* each other^u, because their interests are the same: nor *against* each other on account of the implacable dissention which might be occasioned thereby. But by stat. 21 Jac. 1. c. 19. s. 5, 6, commissioners of bankrupt are empowered to examine the wives of bankrupts touching their *estates*.

^t Errington v. Gardiner, B. R. M. 22 G. 3. M. S. See Smith v. Warner, Goldsb. 76. Dalby v. Dorthall, Cro. Car. 553. Anon. W. Jones, 440. Smith v. Cooper, W. Jones, 409.

^u Davis v. Dinwoody, 4 T. R. 672. Bull. N. P. 286.

CHAP. IX.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

- I. *Of the Nature of a Bill of Exchange.*
- II. *Of the Capacity of the contracting Parties to a Bill of Exchange.*
- III. *Of the Requisites in a Bill of Exchange, and herein of the Stamp, Date, and Consideration.*
- IV. *Of Presentment for Acceptance---Acceptance---qualified Acceptance---Liability of the Acceptor---Non-acceptance, and Notice thereof---Protest---Liability of the Drawer on Non-acceptance.*
- V. *Of the Transfer of Bills of Exchange---Of the Party in whom the Right of Transfer is vested.*
- VI. *Of Presentment for Payment, and herein of the Days of Grace---Non-payment and Notice thereof---Protest.*
- VII. *Of the Acts of the Holder whereby the Parties to the Bill may be discharged.*
- VIII. *Of the Action on a Bill of Exchange---Evidence---Recovery of Interest.*
- IX. *Of the Nature of a Promissory Note---Stat. 3 and 4 Ann. c. 9. s. 1. placing Promissory Notes on the footing of Inland Bills of Exchange---What are negotiable Notes within the Statute---Of Bankers' Notes---Joint and several Notes---Consideration---Stamp.*
- X. *Of the Time when a Note ought to be presented for Payment.*
- XI. *Of the Declaration---Pleadings---Evidence---Conclusion.*

I. *Of the Nature of a Bill of Exchange.*

A BILL of exchange is a written order from A. to B. directing B. (who has, or is supposed to have, in his hands sufficient effects belonging to A.) to pay a sum of money to C. or order, or to C. or bearer, either at sight, or a certain number of days after sight, or after date, or at single, double, or treble usance, or on demand.

The peculiar properties of a bill of exchange are these: First—It is assignable to a third person not named in the bill, or party to the contract, so as to vest in the assignee a right of action *in his own name*; contrary to the general rule of law, that choses in action are not so assignable. Secondly—Although a bill of exchange be merely a simple contract, and not a specialty, yet it will be presumed that it has been originally given for a good and valuable consideration.

Bills of exchange are either foreign or inland; foreign bills of exchange have long been considered as the most convenient paper security among merchants^a, in conformity to the universal usages and customs established among traders, by unanimous concurrence, for facilitating a general commerce throughout the world.

The person making the bill is called the *drawer*, the person to whom it is directed the *drawee*, and the person in whose favour it is made the *payee*. When the drawee has undertaken to pay the bill, he is stiled the *acceptor*, and his undertaking to pay the bill is called an *acceptance*.

Bills of exchange payable to order are assignable by endorsement. The person making an endorsement is called the *endorser*; the person, in whose favour it is made, the *endorsee*, the party in possession of the bill, and entitled to receive its contents, the *holder*.

Bills payable to bearer are transferrable by delivery without endorsement^b.

Where the drawee refuses to accept, a stranger, after protest for non-acceptance, may accept for the honour of the drawer, and thereby such stranger acquires certain rights, and subjects himself to the same obligations as if the bill had been directed to him. So a stranger may become a party to a bill, *paying* it after protest for non-payment, either for the honour of the drawer or endorsers.

^a Postleth. Dict.

^b Grant v. Vaughan, 3 Bur. 1516.

Although regularly there ought to be three persons concerned in a bill of exchange, viz. drawer, drawee, and payee, yet there may be only two; that is, the characters of drawer and payee may be sustained by the same person^c, as if A. draw a bill in this manner, "Pay to me or my order £ Value received by myself."

A bill of exchange is a simple contract^d, and consequently is within the statute of limitations; and must be sued for within six years after it becomes payable.

Bills of exchange for value received^e, are not such matters of account as are intended by the exception in the statute of limitations concerning merchants' accounts.

A bill of exchange is to be considered as a simple contract debt in a course of administration, which an executor or administrator cannot discharge before debts by bond, without being guilty of a devastavit.

If a merchant in London draws a bill of exchange on his correspondent in Newcastle^f, in favour of J. S., and the bill is refused, and J. S. dies intestate, his administrator, on letters of administration taken out at Durham, cannot bring an action on the custom of merchants against the drawer, and lay the same in London, because a bill of exchange is not equal to a bond or specialty, which are the deceased's goods where they happen to be at his death, but is a simple contract which follows the person of the debtor, and makes *bona notabilia* where the debtor resides, and therefore administration ought to be taken out in London.

II. *Of the Capacity of the contracting Parties to a Bill of Exchange.*

ALL persons, whether merchants or not, if they have capacity to contract, may be parties to a bill of exchange. This appears from the case of *Sarsfield v. Witherly*, Carth. 82. in which it was decided, that the act of drawing a bill of exchange constituted the drawer a merchant, within the custom of merchants, so as to make him responsible to the holder upon non-payment.

Corporations, by the intervention of their agents, may be

^c Per Holt C. J. in *Buller v. Cripps*, 6 Mod. 30.

^d *Renew v. Axton*, Carth. 3.

^e *Chevely v. Bond*, Carth. 226.

^f *Yeomans v. Bradshaw*, Carth. 373.

parties to a bill of exchange; but by stat. 6 Ann. c. 22. s. 9, and 15 Geo. 2. c. 13. s. 5. it shall not be lawful for any body politic or corporate, other than the governor and company of the Bank of England, or for any other persons, united in covenants or partnership, exceeding the number of six persons, in England, to borrow or take up any sums of money on their bills or notes, payable at demand, or at any less time than six months from the borrowing thereof, during the continuance of the privilege of exclusive banking granted to the governor and company of the Bank of England.

Infant.—An infant cannot bind himself by a bill drawn in the course of trade^g, or even for necessities^h. But infancy is a personal privilege, of which the infant alone can avail himself. Hence it has been holden, that the drawer of a bill of exchange cannot set up the infancy of the payee and indorser as a defence to the actionⁱ(1).

A feme covert cannot bind herself by drawing a bill of exchange.

This proposition falls within the general rule of law, which permits married women to avoid all contracts made by them during their coverture. To this rule there are some exceptions, which are stated under title Baron and Feme, Sect. II.

The interest in a bill of exchange or note given to a feme covert, vests in her husband, and he must endorse it.

An action was brought by the endorsee against the maker of a promissory note^k. The first count of the declaration was upon the note, to which were added the money counts. It appeared that the note had been given by the defendant to a married woman, with knowledge of her coverture, to the intent that she should endorse it to the plaintiff, which was done accordingly, in payment of a debt which she owed him (in the course of carrying on trade in her own name

^g Williams v. W. Harrison & R. Harrison, Carth. 160. ⁱ Grey v. Cowper, B. R. E. 22 Geo. 3. MS.
^h Williamson v. Watts, 1 Camp. N. ^k Barlow v. Bishop, 1 East's R. 432. P. C. 552. Sir J. Mansfield C. J.

(1) In like manner the *acceptor* of a bill of exchange cannot set up the infancy of the drawer as a defence to an action brought at the suit of the endorsee. Taylor v. Croker, 4 Esp. N. P. C. 187. and per Lord Hardwicke in Haly v. Lane, 2 Atk. 181-2 S. P. So, though a note given by a wife to a husband is void; yet if it is endorsed over by the husband, as between him and the endorsee, it is certainly good. Ibid.

with the consent of her husband). The plaintiff had dealt with her as a feme sole. It was holden, that the property in the note vested in the husband by the delivery to the wife, and that her endorsement did not transfer any interest to the plaintiff; consequently he was not entitled to recover on the special count; nor on the money counts, because no money had passed between the plaintiff and defendant.

But if a promissory note is made payable to a married woman, and she endorses it for value in her own name¹, *and the maker afterwards promises to pay it*, in an action against him by the endorsee, it will be presumed, that the nominal payee had authority from her husband to endorse the note in that form, and the endorsement will be considered as vesting a legal title to the note in the plaintiff.

Bills of exchange may be drawn, accepted, or endorsed, by means of the agent or attorney of the party (2). An agent or attorney for this purpose may be constituted by parol (3). In such case the principal is said to draw, accept, or endorse by procuration. Agents should be cautious how they accept bills directed to them personally, and not to their principals, although such direction describe them in their official characters; for in such case, if they accept in their own name, they will become personally responsible, as appears from the following case:

The plaintiff was endorsee of a bill of exchange, drawn from Scotland upon the defendant in these words^m, "At thirty days sight pay to J. S. or order 200*l.* value received of him, and place the same to account of the York Buildings' Company, as per advice from Charles Mildmay. To Mr. Humphrey Bishop, cashier of the York Buildings' Company, at their house in Winchester Street, London. Accepted per H. Bishop." The bill not having been paid, an action was brought against defendant upon his acceptance; at the trial he proved, that the letter of advice was addressed to the company; and that, the bill having been brought to their house, defendant was ordered to accept it, which he did in the same manner

¹ *Cotes v. Davis*, 1 Camp. N. P. C. 485. ^m *Thomas v. Bishop*, Str. 955. Ca. Temp. Hardw. 1. S. C.

(2) Many persons, under disabilities in other respects, may act as private attornies, such as infants, femmes covert, persons attainted, outlawed, excommunicated, aliens, &c. 1 Inst. 52 a.

(3) The holder of a bill may authorise another person to endorse his name on it, by parol, per Holt C. J. at N. P. 12 Mod. 564.

as he had accepted other bills. Page J. directed the jury to find for the plaintiff, which they did accordingly. On motion for a new trial the court held the direction right; "for the bill on the face of it imported to be drawn on the defendant, and it was accepted by him *generally*, and not as servant to the company, to whose account he had no right to charge it until actual payment by himself. And this being an action by an endorsee, it would be of dangerous consequence to trade, to admit evidence arising from extrinsic circumstances—as the letter of advice. *And this differed widely from the case of a bill addressed to the master, and underwritten by the servant; where undoubtedly the servant would not be liable, but his acceptance would be considered as the act of the master.* A bill of exchange is a contract by the custom of merchants, and the whole of that contract must appear in writing. In this case there was nothing in writing to bind the company, nor could any action be maintained against them upon the bill: for the addition of cashier to defendant's name was only to denote the person with certainty; the direction to whose account to place it, was for the use of the drawee only." Judgment for the plaintiff (4).

Partners.—By the custom of Englandⁿ, where there are joint-traders, and one of them accepts a bill drawn on them *for himself and partner*, such acceptance binds all the partners, if it concerns the trade; otherwise, if it concerns the acceptor only in a separate and distinct interest.

If a bill of exchange is drawn upon a firm, and one of the partners accept it in his own name, this acceptance binds the partnership^o. So if A. B. and C. are in partnership, and A. draws a promissory note, by which he promises *individually* to pay the money, and which he signs with his own name only, but prefixing to his signature "*for A. B. and C.*" this binds the whole partnership^p.

Where there are several partners it is competent to either of them, by his endorsement, in the name of the firm, to pass their interest in the bill^q; and such endorsement made by

ⁿ Pinkney v. Hall, Salk. 126.

^o Mason v. Rumsey, 1 Camp. N. P. C. 384.

^p Ld. Galway v. Matthew, 1 Camp. N. P. C. 403.

^q Swan v. Steele, 7 East, 210. Arden v. Sharpe and another, 2 Esp. N. P. C. 524. Wells v. Masterman, 2 Esp. N. P. C. 731.

(4) One who covenants for *himself, his heirs, &c.* under his own *hand and seal*, for the act of another, shall be personally bound by his covenant, though he describe himself in the declaration as *covenanting for and on the part and behalf* of such other person. Appleton v. Binks, 5 East's R. 148.

one partner for the satisfaction of his separate debt, cannot be questioned in an action by the endorsee against the acceptor, without shewing that the endorsement was at the time unknown to or unauthorised by the other partner. But if a creditor of one of the partners collude with him to take security for his individual debt, out of the partnership funds, knowing at the time that it is without the consent of the other partners, it is fraudulent and void; but if it be taken *bonâ fide* without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the partner, in giving such security, can disaffirm the act.

If a bill is sent into circulation after the dissolution of a partnership, all the partners must join in the endorsement, and one by putting the partnership name thereon cannot bind the rest (5); for the moment the partnership ceases, the partners become distinct persons; from that time they are tenants in common of the partnership property undisposed of. In like manner, after a secret act of bankruptcy committed by one of two partners, the other cannot by an endorsement in the name of the firm transfer the property in a bill, which belonged to the firm before the bankruptcy; for, the partnership having ceased to exist, the solvent partner is to be considered as tenant in common with the assignees of the bankrupt partner, and the property in the bill can only be transferred by their respective endorsements.

r Ridley v. Taylor, 13 East, 175.

t Ramsbottom v. Lewis, 1 Camp. N.

s Abel v. Sutton, 3 Esp. N. P. C. 106.

P. C. 279.

Kenyon, C. J.

(5) Endorsee v. Defendant as one of the drawers of a bill of exchange, the other drawers having become bankrupts*:

The bill was drawn in the firm of "James King and Co." under which firm the defendant and his partners had traded. It appeared that there were other partnerships carried on under the same firm, in which the other drawers were concerned, but in which the defendant had no share. The defendant offered to shew that this bill was not drawn on account of the partnership in which he was concerned, but on account of one of the others, and that he knew nothing of it. Lord Kenyon C. J. was of opinion that the defendant was nevertheless liable; he had traded with the other persons under that firm, and persons taking bills under it, though without his knowledge, had a right to look to him for payment.

* Baker and others v. Charlton, London Sitings, after Trinity Term, 31 Geo. 3. B. R. Peake N. P. C. 60.

III. *Of the Requisites in a Bill of Exchange, and herein of the Stamp, Date, and Consideration.*

IN order to prevent any mistake in the manner of penning this instrument (although to constitute a bill of exchange there is not any precise form required^a) a foreign and inland bill of exchange are subjoined in the proper form:

Foreign Bill.

London, 1st January, 1806.

Stamp.

Exchange for 10,000 Livres Tournoises^b.

At two usances (or "at sight," or "after date") pay this my first bill of exchange, (second and third of the same tenor and date not paid) to Messrs. or order ("or bearer") ten thousand Livres Tournoises, value received of them, and place the same to account as per advice from

JAMES OATLAND.

To Mr.
payable at

in Paris }

Inland Bill.

£100

London, 1st January, 1806.

Stamp.

At sight (or "on demand," "at after sight" "at after date") pay to Mr. or order ("or bearer") one hundred pounds, for value received.

SAMUEL SKINNER.

To Mr. merchant in }
Bristol, payable at }

^a Per Cur. Ld. Raym. 1397.

^b Chitty 37.

With respect to these bills of exchange, the following rules must be observed:

A bill of exchange must *not* purport to be payable out of a particular fund, which may or may not be productive^c, or upon an event which may not happen; for it would perplex the commercial transactions of mankind, if paper securities were issued into the world encumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to inquire at what time these uncertain events would probably be reduced to a certainty.

The following cases will illustrate this position;

An action was brought by payee against drawer of a written instrument in these words^d:

“Seven weeks after date pay A. B. £ out of
W. Steward's money as soon as you receive it.”

It was objected “that it was payable out of a supposed fund at a future time, which was uncertain and might or might not happen.” The court gave judgment for the defendant; and De Grey C. J. said, that the instrument or writing which constituted a good bill of exchange, according to the law, usage, and custom of merchants, was not confined to any certain form of words, yet it must have some essential qualities, without which it was not a bill of exchange; it must carry with it a personal and certain credit given to the drawer, not confined to credit upon any *thing* or *fund*; that the payee or endorsee took it upon no particular event or contingency, except the failure of the general credit of the person drawing or negotiating the same (6).

So where a bill was drawn by an officer upon his agent, requesting him to pay *out of his growing subsistence*, it was^e holden not to be good, because the fund was uncertain.

^c *Jenney v. Herle*, *Ld. Raym.* 1362.

Stevens v. Hill, 5 *Esp. N. P. C.* 247.

^d *Dawkes and another v. Ld. De Lorraine*, 3 *Wils.* 207. 2 *Bl. R.* 782. *S. C.*

^e *Josselyn v. Lacier*, argued *P. 1 Geo.*

1. *B. R.* 10 *Mod.* 294. adjudged in

the same term, 10 *Mod.* 316. *Fort.*

291. *S. C.*

(6) So where the instrument declared on was, “Pay A. B. one month after date £ *on account of the freight of the Veale Galley.*” It was objected, that it was an order upon a particular fund, and on this ground Lee C. J. ruled it not to be a bill of exchange. *Banbury v. Lissett*, *London Sitting, Str.* 1212.

So a request to J. S. to pay £ out of the monies in J. S.'s hands^f, belonging to the proprietors of the Devonshire mines, was holden not to be a bill of exchange, because it was uncertain, whether the fund would be sufficient to pay it (7).

So an order to pay money out of the fifth payment when it should become due, and it should be allowed by the drawer^g.

The same principle was recognized in the following case, although the instrument was holden to be a good bill of exchange.

J. S. on 25th May, 1724, drew a bill on J. N.^h and directed him, one month after date, to pay A. B. or order £ as his quarter's half-pay from 24th June, 1724, to 25th September following: The court were of opinion, that this was a good bill of exchange; for it was *not* payable upon a contingency *nor* out of a particular fund, and was made payable at all events; and was drawn upon the general credit of the drawer, not out of the half-pay; for it was payable as soon as the quarter began for the half pay mentioned in the bill, which was not to be due till three months after. The mention of the half-pay was only by way of direction to the drawee, how he should reimburse himself.

Of the Stamp.—A bill of exchange cannot be given in evidenceⁱ; nor is it in any manner available, unless it be duly stamped, that is, not only with a stamp of the proper value, but also with a stamp of the proper denomination, or the peculiar stamp appropriated to this species of instrument by the legislature.

The amount of the stamp duties on bills of exchange is at this time (1812) regulated by stat. 48 Geo. 3. c. 149, as follows,

Inland bill of exchange, draft, or order, for the payment to the bearer, or to order, either

^f *Jenney v. Herle*, B. R. on error from C. B. Str. 591. and more fully reported in 8 Mod. 265. Lord Raym. 1861. and 11 Mod. 384. Leach's edit.

^g *Haydock v. Lynch* on demurrer to declaration, Ld. Raym. 1563.

^h *Macleod v. Snee*, E. 13 Geo. 1. B. R. on error from C. B. Lord Raym. 1481. Str. 762. and 11 Mod. 400. Leach's ed.

ⁱ 1 Bos. & Pul. N. R. 30.

(7) The reason it was held not to be a bill of exchange, in *Jenney v. Herle*, was because it was no more than a private order to a man's servant. Per Cur. in *Macleod v. Snee*, Str. 762.

BILLS OF EXCHANGE.

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on demand or otherwise of any sum of money,

	£.	s.	d.
Amounting to 40s. and not exceeding 5l. 5s.	0	1	0
Exceeding 5l. 5s. 30l.	0	1	6
Exceeding 30l. 50l.	0	2	0
Exceeding 50l. 100l.	0	3	0
Exceeding 100l. 200l.	0	4	0
Exceeding 200l. 500l.	0	5	0
Exceeding 500l. 1000l.	0	7	6
Exceeding 1000l. 3000l.	0	10	0
Exceeding 3000l.	1	0	0

Inland bill, draft, or order, for the payment of any sum of money, though not made payable to the bearer, or to order, if the same shall be delivered to the payee, or some person on his behalf - - - - - } The same duty as on a bill of exchange for the like sum, payable to bearer or order.

Inland bill, draft, or order, for the payment of any sum of money weekly, monthly, or at any other stated periods, if made payable to the bearer, or to order, or if delivered to the payee, or some person on his behalf; where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom - - - - - } The same duty as on a bill payable to bearer or order, for a sum equal to such total amount.

And where the total amount of the money thereby made payable shall be indefinite - - - - - } The same duties as on a bill for the sum expressed only.

And the following instruments shall be deemed and taken to be inland bills, drafts, or orders, for the payment of money, within the intent and meaning of this schedule, and of the foregoing act, viz.

All drafts or orders for the payment of any sum of money, by a bill or promissory note, or for the delivery of any such bill or note, in payment or satisfaction of any sum of money, where such drafts or orders shall require the payment or delivery to be made to the bearer or to order, or shall be delivered to the payee, or some person on his behalf;

All receipts given by any banker, or other person, for money received, entitling, or in-

tending to entitle, the person paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons;

And all bills, drafts, or orders, for the payment of any sum of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made payable to the bearer or to order, or if the same shall be delivered to the payee, or some person on his or her behalf.

Foreign bill of exchange, (or bill of exchange drawn in, but payable out of Great Britain,) if drawn singly, and not in a set

The same duty as on an inland bill of the same amount and tenor.

Foreign bill of exchange, drawn in sets according to the custom of merchants, where the sum made payable thereby shall not exceed 100*l.* for every bill in each set

£. s. d.
0 1 0

Where the sum shall exceed 100*l.* and not exceed 200*l.*

0 2 0

Where the sum shall exceed 200*l.* and not exceed 500*l.*

0 3 0

Where the sum shall exceed 500*l.* and not exceed 1000*l.*

0 4 0

And where the sum shall exceed 1000*l.* and not exceed 3000*l.*

0 5 0

And where it shall exceed 3000*l.*

0 10 0

Exemptions from the preceding and all other Stamp Duties.

All bills of exchange or bank post bills issued by the governor and company of the Bank of England.

All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker, or any person acting as a banker, who shall reside, or transact the business of a banker, within ten miles of the place where such drafts or orders shall be drawn, provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes.

The legislature having in contemplation the mistakes which might arise in the use of stamps of an improper denomination, has by stat. 37 Geo. 3. c. 136. made provision for those mistakes; for, by the 5th section of that statute it is enacted, that bills and notes made after the passing this act, and liable to a stamp duty by stat. 31 Geo. 3. c. 25. if stamped with a stamp of a different denomination than is required by the last mentioned act, may, if the same be of *equal or superior* value to the stamp required, be stamped by the commissioners on payment of the duty and penalty; that is, by sect. 6. of the 37th Geo. 3. c. 136. the penalty of forty shillings, if the bill or note is produced to the commissioners, *before* it is payable, and ten pounds, if so produced *after* it is payable.

Since this statute of 37 Geo. 3. it has been determined^k, that a promissory note drawn before the 37th Geo. 3. c. 136. upon a receipt stamp of equal value with that required for a promissory note, is not available in law (8).

By stat. 43 Geo. 3. c. 127. s. 6. it is enacted that every instrument^l, matter, or thing, although stamped or impressed with any stamp of greater value than the stamp required by law, shall be valid and effectual, provided such stamp shall be of the denomination required by law for such instrument, &c.

Endorsee of a bill of exchange, against the acceptor^m. It appeared at the trial, that the bill, which was drawn on a proper stamp, was originally dated on the 2nd September 1793, payable *twenty-one* days after date; and, while it continued in the hands of the drawer, it was altered with the consent of the acceptor, to be made payable *fifty-one* days after date, and afterwards with the like consent was again restored to *twenty-one* days after date, and the date brought

^k Chamberlain v. Porter, 1 Bos. & Pul. N. R. 30.

^l See Farr v. Price, 1 East's R. 55. and Taylor v. Hague, 2 East's R. 414.
^m Bowman v. Nichol, 5 T. R. 537.

(8) The act of 37 Geo. 3. c. 136. is a clear legislative declaration, that it is not sufficient, that a certain sum of money be paid on the instruments which are the subjects of taxation, but the stamp used must be of the proper denomination. Per Sir J. Mansfield C. J. delivering the opinion of the court in Chamberlain v. Porter, 1 Bos. & Pul. N. R. 33.

It may be observed that by stat. 31 Geo. 3. c. 25. bills and notes were forbidden to be stamped after they were made.

forward from the 2nd to the 14th September. This last alteration was made on the 30th September, the bill being then over due according to the original tenor of it; after these alterations, it was negotiated, and came into the hands of plaintiff. *Lord Kenyon* C. J. nonsuited the plaintiff, and, on a motion to set aside the nonsuit, the court were clearly of opinion, that the nonsuit was proper; for that at the time when the last alteration was made, the operation of the bill, as it originally stood, was quite spent; that it was a new and distinct transaction between the parties; and that therefore there ought to have been a new stamp.

The plaintiff declared as endorsee of a bill of exchange against the acceptor^a; and it appeared that the bill in question, which was drawn by Giles and Co. on the 3rd of June, 1807, payable to their own order, and accepted by the defendant at 3 months date, was exchanged by him with Giles and Co. for their acceptance of a bill drawn by the defendant for the same sum at 85 days payable to his order, the object being that Giles and Co. should put the defendant in cash before his acceptance became due. On the 23rd of June, before Giles and Co. or the defendant had passed the respective securities to any other person, it was agreed to procrastinate the payment of the bills by post-dating them the 23rd of June, instead of the 3rd. The court were of opinion, that the alteration rendered a new stamp necessary; observing, that the delivery of the bill by the drawer to the acceptor, and the re-delivery of it for a valuable consideration, such as the exchange of acceptances, has been held to be since *Cowley v. Dunlop*, 7 T. R. 565. a negotiation of the bill; that the several drawers were mutual purchasers of each other's acceptances; and as the alteration was made, while the bill was in this course of negotiation, and after it had continued so 20 days (during which time it was in the power of the drawer and payee to have passed it to any third person) it was in effect drawing a new bill. So where a promissory note, payable by the defendant to the plaintiff or order^b, was originally expressed to be *for value received*, but the day after it had been signed and delivered by defendant to plaintiff it was by consent of the parties altered by the addition of the words *for the good will of the lease and trade of Mr. F. K. deceased*; it was holden, that as the alteration was material, as well because it was evidence of a fact, which if necessary to be inquired into must otherwise have been proved by different evidence, as also because it pointed out the particular consideration for the note, and put the holder

^a *Cardwell v. Martin*, 9 East, 150.

^b *Knill v. Williams*, 10 East, 435.

upon inquiring, whether that consideration had passed; and as such alteration was made after the note had issued, a new stamp was necessary.

Omission of Date.—Regularly every bill of exchange ought to be dated; but in the following cases where the day of the date was omitted in the declaration, the court said they would intend the bill to bear date on the day when it was made (9).

Case on a foreing bill of exchange payable at double usance from the date^p, and it was alleged that the party beyond the sea drew the bill on a certain day, and that the same was presented to and accepted by the defendant. Exception, that the date of the bill was not set forth. The court said, that they would intend the bill dated at the time of drawing it. Judgment for plaintiff.

So, where in the first count of the declaration it was stated^q, that the defendant heretofore, to wit, on the 15th day of September, 1800, drew a bill of exchange bearing date the day and year aforesaid, payable two months after date. The 2nd count stated, that the defendant afterwards to wit, on the same day and year aforesaid, drew a certain bill of exchange payable two months after date. On writ of error, after judgment by default, it was objected, that the 2nd count could not be sustained; because the date of the bill was not stated; that, although in *De la Courtier v. Bellamy* the court held, that it might be intended, that the date of the bill was the day of the drawing, yet there the day of drawing was expressly stated; whereas in this case, it was to be collected only from words of reference to the first count, in which the day of drawing was laid under a "to wit." But the court were of opinion, that this case was not distinguishable from *De la Courtier v. Bellamy*, and that they might well intend the date to have been the day of drawing stated in the first count.

The defendant, on the 4th May, 1810, drew a bill of exchange, which he dated on the 11th May, 1810, payable sixty-five days after date, and delivered it to the payee, who

^p *De la Courtier v. Bellamy*, B. R. H. 36 & 37 Car. 2. 2 Show. 422.

^q *Hague v. French*, Exchequer Chamber, in error. T. 42 Geo. 3. 3 Bos. & Pal. 173.

(9) A date is not of the substance of a deed, for if it want a date, or have a false or impossible date, as the 30th of February, yet the deed is good. *Godard's case*, 2 Co. 5. 2.

after endorsing it for a valuable consideration to the plaintiff *on the 5th of May*, died *on the same day*. It was holden, that the plaintiff was entitled through this endorsement to recover against the drawer.

Alteration of Date.—A bill of exchange was drawn on defendant on the 26th March, 1788, payable three months after date to J. S., and accepted by defendant. *After acceptance*, and while the bill remained in the hands of J. S. the payee, the date of the bill was altered by some person unknown, from the 26th March, 1788, to the 20th March, 1788, without the authority or privity of defendant; J. S. the payee afterwards endorsed the bill so altered to the plaintiff for a valuable consideration. It did not appear, that plaintiff knew of the alteration at the time when the bill was endorsed to him. Payment having been refused, plaintiff sued the defendant as acceptor. The declaration contained two special counts, (one on a bill dated the 20th March, 1788, the other on a bill dated the 26th March, 1788) and the money counts. Special verdict. The case was argued twice in B. R. after which the court gave judgment for defendant (Buller J. dissentient), on the ground that the alteration of the instrument had avoided it. *Lord Kenyon C. J.* said, “I lay out of my consideration all the cases where the alteration was made by accident: for here it is stated that this alteration was made while the bill was in the possession of the payee, who was then entitled to the amount of it, and from whom plaintiffs derive title: and it was for the advantage of the payee (whether more or less is immaterial here) to accelerate the day of payment, which in this commercial country is of the utmost consequence. The cases cited, which were all of deeds, were decisions which applied to, and embraced the simplicity of all the transactions at that time; for at that time almost all written engagements were by deed only. Therefore those decisions which were indeed confined to deeds, applied to the then state of affairs; but they establish this principle, that all written instruments which were altered or erased, should be thereby avoided. Then let us see whether the policy of the law, and some later cases, do not extend this doctrine farther than to the case of deeds. It is of the greatest importance that these instruments, which are circulated throughout Europe, should be kept with the utmost purity, and that the sanctions to preserve them from fraud should not be lessened. It was doubted,

r *Pasmore v. North*, 13 East, 517.

s *Master and others v. Miller*, B. R.

T. 31 Geo. 3. 4 T. R. 320. affirmed

on error in Exchequer Chamber, 3 H. Bl. 141.

so lately as in the reign of George the first, in Ward's case, 2 Str. 747. and 2 Ld. Raym. 1461., whether forgery could be committed in any instrument less than a deed, or other instrument of like authentic nature; and it might equally have been decided there, that as none of the preceding determinations extended to that case, the policy of the law should not be extended to it. But it was there held, that the principle extended to other instruments as well as to deeds, and that the law went as far as the policy. It is on the same reasoning that I have formed my opinion in the present case. It has been contended that no fraud was intended in this case; at least, that none is found: but I think that if it had been done by accident, that should have been found, to excuse the party, as in one of the cases where the seal of the deed was torn off by an infant. On the whole I am of opinion, that this falsification of the instrument has avoided it."—*Ashhurst J.* concurred in opinion with *Kenyon C. J.*—*Buller J.* gave an elaborate opinion in favour of the plaintiff—*Grose J.* said, "From *Pigot's case*, 11 Rep. 27. which is the leading case, I collect, 1st. that when a deed is erased, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of the plea pleaded it was not his deed: and 2ndly. that when a deed is altered in a material point by himself, or even by a stranger, without the privity of obligee, the deed thereby becomes void. Now the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. In reading that, and the other cases cited, I observe that it is no where said, that the deed is void merely because it is the case of a deed, but because it is *not the same deed*. A deed is nothing more than an instrument or agreement under seal: and the principle of those cases is, that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on good sense, because it tends to prevent the party, in whose favour it is made, from attempting to make any alteration in it. This principle too, appears to me as applicable to one kind of instruments as to another. But it has been contended, that there is a difference between an alteration of bills of exchange and deeds: but I think that the reason of the rule affects the former more strongly, and the alteration of them should be more penal than in the latter case. Supposing a bill of exchange were drawn for £100, and after acceptance the same was altered to £1000; it is not pretended that the acceptor shall be liable to pay the

£1000; and I say, that he cannot be compelled to pay the £100, according to his acceptance of the bill, because it is not the same bill. So if the name of the payee had been altered, it would not have continued the same bill (10). And the alteration in every respect prevents the instrument continuing the same as well when applied to a bill as to a deed. I do not think that the plaintiffs can recover on the general counts, because it is not stated as a fact in the verdict, that the defendant received the money, the value of the bill." Judgment for defendant.

If upon a bill being presented for acceptance, the drawee alters it as to the time of payment, and accepts it so altered; although the drawer and endorser are thereby discharged; yet if the holder acquiesces in such alteration and acceptance, the bill will be good as between the holder and acceptor.

Of the Person to whom the Bill is made payable.—Regularly a bill of exchange ought to be made payable to a real person, but if it be drawn payable to a fictitious payee or order, and endorsed in his name, *by concert between the drawer and acceptor*, it will be considered as a bill payable to bearer, and may be declared on as such in an action by an innocent endorsee for a valuable consideration against the drawer—*Collis and others v. Emmet*, 1 H. Bl. 313; or against the ac-

t *Patou v. Winter*, 1 Taunt. 420.

(10) So if the word "date" be inserted, instead of the word "sight." *Long v. Moore*, London Sittings after H. T. 30 G. 3. *Kenyon C. J.* 3 Esp. N. P. C. 155. But a mere correction of a mistake, as by inserting the words "or order," in furtherance of the intention of the parties, will not vitiate the bill. *Kershaw v. Cox*, London Sittings after M. T. 41 G. 3. *Le Blanc J.* So if the alteration be not in the time of payment, sum, &c. or other material part, the bill will not be affected by it. Hence, writing on the bill, the place where it was to be paid, has been holden not to destroy the validity of the bill. *Trapp v. Spearman*, London Sittings after M. T. 40 G. 3. *Kenyon C. J.* 3 Esp. N. P. C. 57. So when in an action by the endorsee, against the acceptor of a bill, it appeared that, after the bill had been accepted by the defendant, the words "Prescott and Co." had been written under his name by the drawer, without his knowledge or assent, the plaintiff having refused to take the bill unless these words were added. Lord Ellenborough held, that as the addition of these words did not alter the responsibility of the acceptor, he was still liable. *Marson v. Petit*, 1 Camp. N. P. C. 82. n.

ceptor—Gibson and another v. Minet and another, 1 H. Bl. 569. But see contr. the opinions of Eyre C. J. and Heath J. 1 H. Bl. p. 598, 625. with whom Lord Thurlow Ch. concurred. But if the circumstance of the payee being a fictitious person is unknown to the acceptor^a, he cannot be declared against on the bill, either as a bill payable to bearer, or to the order of the drawer.

Words "or Order."—The negotiability of a bill of exchange depends on its being made payable to A. or order, (11) or to A.'s order, or to A. or bearer. See post, on the transfer of bills of exchange. A bill payable to A.'s order is the same as if it were made payable to A. or order^x, and may be declared on, without alleging that A. did not make any order for the payment of the bill to any other person^y.

"Value received."—It is not essentially necessary to insert the words "value received^z." (12) But if they are omitted in inland bills, the holder cannot avail himself of the provisions of 9 & 10 W. 3. c. 17., and 3 & 4 Ann. c. 9. s. 4.

A bill of exchange is *presumed* to be made upon a good and valuable consideration; and in actions not between immediate parties some suspicion must be cast on the plaintiff's title before he can be compelled to prove what consideration he has given for it. A mere notice given by the defendant to the plaintiff, that he will be required at the trial to

^a Bennett v. Farnell, 1 Camp. N. P. C. 130.

^x Per Holt C. J. 12 Mod. 310.

^y Smith v. McClure, 5 East's R. 376.

^z White v. Ledwick, B. R. P. 25 Geo. 3. on demurrer to the declaration. Bayley's Treatise of Bills of Ex-

change, &c. App. No. 3. The case does not state whether it was an inland or a foreign bill. I am not aware that there is any distinction except that which I have pointed out, which is founded on the statute of Wm.

(11) In Hill v. Lewis, Salk. 133. exception was taken that a bill was payable to defendant only, without the words, "or his order," and therefore not assignable by the endorsement: and Holt C. J. agreed that the endorsement of this bill did not make *him that drew* the bill chargeable to the endorsee; for the words "or his order," give authority to the *plaintiff*^{*} to assign it by endorsement; and it is an agreement by the first drawer that he would answer it to the assignee; but the endorsement of a bill which has not the words, "or to his order," is good or of the same effect between the endorser and the endorsee, to make the endorser chargeable to the endorsee.

(12) A jury of merchants were of opinion, in Banbury v. Lisset, Str. 1211, that the words, "value received," were essential to the validity of a bill of exchange.

* Q. Payee.

prove the consideration, is not sufficient to cast this burthen on the plaintiff^a. When suspicion is cast on the plaintiff's title by shewing that some previous holder has been defrauded out of it, the plaintiff must prove what consideration he gave for it^b. In actions between immediate parties (13) the illegality or want of consideration^c may be insisted on by way of defence to an action on the bill. In other cases bills of exchange are made void by express statute.

By stat. 9th Ann. c. 14. s. 1. "All notes, *bills*, &c. where
 " the whole or any part of the consideration shall be for
 " money or other valuable thing, won by gaming or playing
 " at cards, dice, tables, tennis, bowls, or other game, or by
 " betting on the sides of such as game, or for repaying any
 " money knowingly lent for such gaming, or lent at the
 " time and place of such play, to any person that shall play
 " or bet, shall be *void* (14) to all intents and purposes."

^a Reynolds v. Chettle, 2 Camp. N. P. C. 596. ^b Rees v. M. of Headfort, 2 Camp. N. P. C. 574.
^c Clarke v. Elliot, B. R. London sittings, after M. T. 52 G. 3. S. P. Puget de Bras v. Forbes, 1 Esp. N. P. C. 117.

(13) "As between the drawer and payee, the consideration may be gone into, yet it cannot between the drawer and an endorsee; and the reason is, because it would be enabling either of the original parties to assist in a fraud:" per Ashhurst J. in Lickbarrow v. Mason, 2 T. R. 71. See an anonymous case in Chancery, Comyns 43. where Sommers Lord Keeper held, that the drawer of a bill of exchange, though given without consideration, was not entitled to relief against a third person, to whom it was assigned for a just debt. See also Snelling v. Briggs, Bul. N. P. 274. where it is said, that it seems a reasonable distinction which has been taken between an action between the parties themselves, in which evidence may be given to impeach the promise, and an action by or against a third person, viz. an endorsee or an acceptor. See also Puget de Bras v. Forbes and another, C. B. London Sittings after M. T. 33 Geo. 3. coram Loughborough C. J. 1 Esp. N. P. C. 117.

(14) See Robinson v. Bland, 2 Burr. 1077. where a bill of exchange given for money lost at play, and money lent at the time and place of play, was holden to be void. See also the case of Bowyer v. Bampton, Str. 1155. where it was holden that an innocent endorsee for a valuable consideration, without notice, could not maintain an action on a promissory note given for money knowingly lent to game with at dice. But the statute 9 Ann. c. 14. only avoids securities for money won or lost at play, and does not extend to cases of mere loans without any security taken; and stat. 16 Car. 2. c. 7. s. 3. only avoids *contracts* for money *lost* at play; consequently an action for money *lent* may be maintained, although it

The 12 Ann. stat. 2. c. 16. s. 1. by which it is enacted that all bonds, contracts, and assurances, made for payment of any principal or money lent, upon usury, shall be utterly void, has been considered as standing on the same ground as the foregoing statute of the 9th of Ann. c. 14. against gaming, and on the authority of the case of *Bowyer v. Bampton*, (which see *infra*) it has been holden^d that the endorsee of a bill of exchange, given for an usurious consideration, cannot maintain an action upon it against the acceptor, although he (the endorsee) has given a valuable consideration for the bill, and is not affected with notice of the usury (15).

^d *Lowe and others v. Waller*, Doug. 537.

should appear, that the money was lent by the plaintiff to the defendant, for the purpose of gaming with him, (*Barjeau v. Walmesley*, Str. 1249. per Lee C. J.) or to pay a bet, at a horse race (*Alcinbrook v. Hall*, 2 Wils. 309.) or at the time and place of play (*Robinson v. Bland*, 2 Burr. 1077. *Wettenhall v. Wood*, 1 Esp. N. P. C. 18. S. P. per Kenyon C. J.) It is to be observed, that although there is not any substantive clause in the stat. 9 Ann. c. 14. which avoids the contract, yet the 2nd sect. of that stat. gives the loser a power to recover back money or goods, of the value of £10 lost at any unlawful game, by action brought within 3 months; but after the expiration of the 3 months the loser cannot recover such goods or money from the winner, although the winner can shew no title to them except what arises from having won them. *Vaughan v. Whitcomb*, 2 N. R. 413.

(15) *Wilmot J.* seems to have anticipated this decision in an opinion delivered by him as one of the judges appointed by a special Commission of Errors, to inspect the judgment of the Sheriff's Court, in the case of *Harrison against Evans*, and the affirmance thereof in the Court of Hustings, at the Guildhall of the city of London, on the 5th of July, 1762; his words are these, "It was said that the law against gaming makes notes 'void to all intents and purposes,' and the act against usury only makes them 'void,' and that a gaming note in the hands of an innocent endorsee would be void against the drawer, but it would not be so in the case of a note given upon an usurious contract; and it was determined in the case of a gaming note, that it would be void in the hands of an endorsee; but if that case is right, which was then thought a hard one, I think the law must be the same upon an usurious note; and no case was cited, either before or since the case upon the gaming note, to establish such a distinction; and I am sure I can find out none in the intention of the legislature between 'void,' and 'void to all intents and purposes.' It is only an amplification of expression, and spreading out the same idea a little more diffusively; but they both equally mean, that the act done shall be considered as if it was not done." See Notes of opinions, &c. by *Wilmot C. J.*, p. 146, 7.

It is to be observed, however, that the foregoing statute applies to those cases only where the bill is *originally* given for an usurious consideration^e; for if the bill is fair and legal in its inception, an endorsement by the payee for an usurious consideration will not avoid it in the hands of a subsequent *bonâ fide* holder; but if a bill is drawn upon an agreement between one of the original parties to it, and a person not a party to it^f, that the latter shall get it discounted by another person likewise not a party to the bill, upon usurious terms, and it is so discounted accordingly, the bill is void for the usury, in the hands of an innocent endorsee; and in such case the bill is void, although the drawer, to whose order it is payable, be not privy to the usurious agreement^g.

Where a party is *compelled* to take goods in discounting a bill of exchange, a presumption arises that the transaction is usurious; and to rebut this presumption, evidence must be given of the value of the goods by the person who has supplied the goods^h and sues on the bill. But where in discounting a bill a proposal is made that goods shall be taken, although such proposal originate with the plaintiff, yet if the other party readily accedes to it, conceiving that he shall make a profit by the transaction, the presumption is, that the goods are charged beneath their value, and it lies upon the defendant to prove the contrary, if he would impeach the plaintiff's title to the bill on the ground of usuryⁱ.

In cases where the illegality of the consideration is such as does not fall within the statutes against gaming and usury, the holder cannot be affected with the transaction between the original parties, unless he either had notice, or took the bill, *after it became due*, from a person who had notice of the illegal consideration for which the bill was given.

The cases of *Peacock v. Rhodes*, *Steers v. Lashley*; and *Brown v. Turner*, will illustrate this position.

Endorsee against drawers of an inland bill of exchange^k. The bill was drawn by the defendants upon Smith and others, payable to William Ingham or order; Ingham endorsed it to Daltry, by whom it was endorsed to Fisher, out of whose pocket it was stolen. The plaintiff received the

^e *Parr v. Eliason and others*, 1 East's R. 92. See also *Daniel v. Cartony*, 8 P. per Kenyon C. J. *Middlesex Sitings*, 1 Esp. N. P. C. 274.

^f *Young v. Wright*, 1 Camp. N. P. C. 139.

^g *Ackland v. Pearce*, 2 Camp. N. P. C. 509.

^h *Davis v. Hardacre*, 2 Camp. N. P. C. 375.

ⁱ *Combe v. Miles*, ib. 559.

^k *Peacock v. Rhodes*, Doug. 632.

bill from a stranger, calling himself William Brown, and endorsing the bill in that name to plaintiff, of whom he bought cloths and other articles in the way of plaintiff's trade. The defendants were strangers to the plaintiff, but he had before taken bills drawn by them which had been duly honoured. Plaintiff declared, as endorsee of Ingham. On a case reserved, Lord Mansfield (after argument) delivered the opinion of the court. "The law is settled, that a holder coming fairly by a bill or note, has nothing to do with the transaction between the original parties, unless, perhaps, in the single case of a bill or note for money won at play (16). I do not see any difference between a note endorsed blank, and one payable to bearer. They both pass by delivery, and possession proves property in both cases. The question of *mala fides* was for the consideration of the jury. The circumstances that the buyer and also the drawers were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds of suspicion very fit for their consideration. But they have considered them and have found it was received in the course of trade." *Postea* to plaintiff.

Endorsee against acceptor of a bill of exchange drawn by one Wilson on defendant¹, and endorsed over by Wilson to the plaintiff after it had been accepted by defendant. At the trial before Kenyon, C. J. it appeared that defendant had engaged in several stock-jobbing transactions with different persons, in which Wilson was employed as his broker, and had paid the differences for defendant. That a dispute arising between Wilson and defendant respecting the amount of those differences, the matter was referred to plaintiff and three others, who awarded a sum of money to be due from defendant to Wilson, for part of which sum Wilson drew the bill in question. Kenyon, C. J. non-suited the plaintiff, being of opinion that as the bill grew out of a stock-jobbing transaction, *which was known to the plaintiff*, he could not recover upon it. A rule having been obtained to shew cause why the non-suit should not be set aside, Lord Kenyon C. J. (after argument in support of the rule) said, "If the plaintiff had lent this money to defendant to pay the

¹ Steers v. Lashley, 6 T. R. 61.

(16) Bowyer v. Bampton, Str. 1155. ante p. 289. The case of Lowe v. Waller, had not been decided when Lord Mansfield delivered this opinion, otherwise he might have added here the case of a bill of exchange given for an usurious consideration.

differences, and had afterwards received the bill in question for that sum, then, according to the principle established in *Petrie v. Hannay* (17), 3 T. R. 418. he might have recovered; but here the bill on which this action is brought was given for those very differences, and therefore Wilson himself could not have enforced payment of it. Then the security was endorsed over to the plaintiff, he *knowing* of the illegality of the contract between Wilson and defendant, for he was the arbitrator to settle their accounts, and under such circumstances he cannot be permitted to recover in a court of law." Rule discharged.

Endorsee of a bill of exchange against the acceptor. The defendant employed one Pritchard, a broker, to transact some business for him in stock-jobbing in omnium, who paid the differences for him, and then drew the bill in question on the defendant for the amount of those differences, which the defendant accepted; afterwards, and *after the bill became due*, Pritchard endorsed the bill to the plaintiff for a prior debt. Lord Kenyon C. J. was of opinion, 1st. That omnium was one of the public stocks or securities within the statute 7 Geo. 2. (Sir John Barnard's act for preventing the infamous practice of stock-jobbing) the loan having been voted by the House of Commons, although the scrip receipts were not then in the market; and, 2dly, That the illegality of the original transaction vitiated the bill, the plaintiff having taken it after it became due, and, consequently, not being entitled to recover, if Pritchard could not (18). A verdict having been taken for

m *Brown v. Turner*, 7 T. R. 630.

(17) In the case of *Petrie v. Hannay*, it was decided, that if two persons jointly engage in a stock-jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them repay the broker, with the privity and consent of the other, the whole sum, he may recover a moiety from the other in an action for money paid to his use. But see *Aubert against Maze*, 2 Bos. and Pul. 373. where the authority of *Petrie v. Hannay* was doubted.—Eldon C. J.

(18) A party taking a bill of exchange or note after it is due, takes it subject to all the equity to which the party from whom he had it is liable. In *Brown v. Davies*, 3 T. R. 80. it was said by Buller J. that generally when a note is due, the party receiving it takes it on the credit of the person who gives it to him. To this position Kenyon C. J. agreed, with the addition of this circumstance, that if it appeared on the face of the note to have been dishonoured, or if knowledge could be brought home to the endorsee

defendant, an ineffectual attempt was made to set it aside, the court being clearly of opinion, on the construction of the act of parliament, and on the authority of the foregoing case of *Steers v. Lashley*, that the plaintiff was not entitled to recover.

IV. *Of Presentment for Acceptance—Acceptance—qualified Acceptance—Liability of the Acceptor—Non-acceptance, and Notice thereof—Protest—Liability of the Drawer on Non-acceptance.*

Presentment for Acceptance.—When a bill is drawn payable within a certain time after sight, it is necessary, in order to fix the time when the bill is to be paid, to present it to the drawee for acceptance. In other cases, it is not essentially necessary for the holder to present the bill before it is due^a; but it is advisable to procure an acceptance, if

^a Chitty, 67.

that it had been so. See Mr. J. Lawrence's approbation of the foregoing rule in *Boehm v. Sterling*, 7 T. R. 431. In *Taylor v. Mather*, E. 27 Geo. 3. B. R. 8 T. R. 83. n. Buller J. said, that it had never been determined that a bill or note was not negotiable after it became due, but if there were circumstances of fraud in the transaction, and it came into the hands of plaintiff by endorsement after it became due, he had always left it to the jury, upon the slightest circumstance, to presume that the endorsee was acquainted with the fraud. See also *Tinson v. Francis*, M. T. 48 Geo. 3. B. R. 1 Camp. N. P. C. 19, where the holder of a note had given a full consideration for a note after it became due, but was not permitted to recover in an action against the maker, the maker having proved that the note was originally made without consideration: Lord Ellenborough C. J. observing, "that after a bill or note is due, it comes disgraced to the endorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives a full consideration for it, he takes it on the credit of the endorser, and subject to all the equities with which it may be encumbered." But if the endorser could have maintained an action on the bill, then the circumstance of the endorsement, after the bill became due, is not sufficient to let in the defence of an illegal consideration. *Chalmers v. Lanion*, 1 Camp. N. P. C. 383. Lord Ellenborough C. J. whose opinion was afterwards confirmed by court of B. R. Whoever takes a bill after its dishonour, takes it with all the infirmities belonging to it, *Crossley v. Ham*, 13 East, 498.

possible; for, by that means another debtor is added to the drawer, who becomes a new security, and, consequently, makes the bill more negotiable. There is not any fixed time, when a bill, drawn payable within a certain time after sight, shall be presented to the drawee. But due diligence must be used (19), and care taken, that the bill be presented within a reasonable time.

Acceptance.—When the drawee accepts a bill in the most usual and formal manner, he writes on the bill the word “accepted,” and subscribes his name; or he writes the word “accepted” only; or he subscribes his name only. It has been frequently lamented, that this, which is the regular mode, has not been adjudged to be the only mode of accepting bills; for then every person to whom the bill passed would see, on the face of the instrument, whether it were accepted or not; but it has long been decided otherwise, viz. that an acceptance, or a promise to accept, by collateral writing, or even by parol, (except for the purpose of charging the drawer of an inland bill with damages and costs, see 3 & 4 Ann. c. 9. s. 5.) is equally binding with an acceptance on the face of the bill.

Defendant was sued as acceptor of a bill of exchange^b. It appeared in evidence to be a parol acceptance only; Lord Hardwicke C. J. ruled it to be sufficient, that being good at common law, and the stat. 3 and 4 Ann. c. 9. (see sect. 5 & 8.) which requires an acceptance to be in writing, in order to charge the drawer with damages and costs, having a proviso, that it shall not extend to discharge any remedy that any person may have against the acceptor; (after argument) the court of King’s Bench agreed in opinion with the Chief Justice.

The drawer of a bill of exchange, having acquainted the

^b Lumley v. Palmer, 2 Str. 1000. S. C. more fully reported in Ca. Temp. Hardw. 74.

(19) “The only rule which can be applied to all cases of bills of exchange is, that due diligence must be used. Due diligence is the only thing to be considered, whether the bill be foreign or inland, or whether it be payable at or so many days after sight, or in any other manner.” Per Buller J. 2 H. Bl. 569.

It seems that, whether due diligence has been used, is a question of law, but dependent upon facts, viz. the situation of the parties, their places of abode, and the facility of communication between them. See *Darbishire v. Parker*, 6 East’s R. 3.

defendant by letter of his having drawn a bill on him^c, and requested him to accept it; the defendant wrote in answer, that the bill *should be duly honoured*, and placed to his debit. Lord Hardwicke Ch. held, that this amounted to an acceptance (20).

So where A., resident in America^d, not having any effects in the hands of the defendants (who resided in London), drew a bill on them, payable at a certain time after sight, which bill, A., for a valuable consideration, endorsed to B., resident in America, who afterwards, for a valuable consideration, endorsed it to the plaintiffs, resident in London. The plaintiffs, on receiving the bill, presented it for acceptance, but the defendants refused to accept it. Afterwards, and before the bill became due, the defendants wrote a letter to A. the drawer, stating that their prospect of security being much improved, they *should accept or certainly pay* the bill; notwithstanding which, when the bill was presented for payment, the defendants refused to pay it. This letter was not received by the drawer in America until after the bill became due. It was holden, 1. that the terms of the letter amounted to an acceptance; for a promise *to accept* an existing bill was an acceptance, and a promise *to pay* it was also an acceptance, and consequently a promise to do the one or the other, i. e. *to accept or certainly pay*, could not be less than an acceptance; that supposing it to be an acceptance, the time when it was to be considered as made, namely, whether at the date of the letter, or at the time when it reached the drawer in America, was immaterial, inasmuch as an acceptance after the time appointed for the payment of a bill was good (21); 2. that although the bill

^c Powell v. Monnier, 1 Atk. 611. ^d Wynne v. Raikes, 5 East's R. 514.

(20) It was said by Lord Ellenborough C. J. in Wynne v. Raikes, 5 East's R. 520. that the authority of this case had not been (as far as the court had been able to find) ever shaken.

(21) Although, regularly, a bill ought to be accepted before the day on which the money is to be paid, yet an acceptance after that day will bind the drawee; and where, upon an acceptance so given, it was stated in the declaration, that the drawee promised to pay the money *according to the tenor and effect of the bill*, the court refused to arrest the judgment on account of these words, observing, that the effect of the bill was the payment of the money, and not the day of payment; and at most they were but surplusage. Jackson v. Piggott, Carth. 459. Lord Raym. 364. and Salk. 127. See also Mutford v. Walcot, Lord Raym. 574. and Salk. 129. recognised by Ellenborough C. J. in Wynne v. Raikes, 5 East's R. 521.

was not taken by the holders upon the credit of the before-mentioned promise to the drawer, nor was the same known to them to have been made at all till after the bill was due, yet the holders might avail themselves of it as an acceptance, for the same circumstances existed in the case of *Powell v. Monnier*: there the promise being long subsequent to the time when the plaintiffs became possessed of the bill by endorsement, could not have formed any part of their original inducement to take it; there, the promise was made to a drawer, who had drawn without having any effects in the acceptor's hands; and there also it did not appear that the holders, the plaintiffs, ever knew of the acceptance prior to the time when the bill became due. Consequently, on the authority of *Powell v. Monnier*, the plaintiffs in this case were entitled to recover.

A. having commissioned B. to receive certain African bills payable to A.^e, drew a bill upon B. for the amount, payable to his own order. B. assured A. by letter, that his bill *should meet with due honour*. The purport of this letter having been communicated to the plaintiffs, who, on the credit of it, advanced money on the bill to A. who endorsed it to them, it was holden, that B. was liable as acceptor in an action by the plaintiffs as endorsees, although after the endorsement, in consequence of the African bills having been attached in the hands of B. (who was ignorant of his letter having been shewn to the plaintiffs) A. wrote to B. advising him not to accept the bill when tendered; which advice would have been a discharge of B.'s acceptance, if the bill had still remained in the hands of A. (22). And Lord Ellenborough C. J. said, "It has been laid down in so

e *Clarke v. Cock*, 4 East's R. 57.

(22) An agreement to accept may amount to an acceptance, and it may be couched in such words as to put a third person in a better condition than the drawer. If one man to give credit to another, makes an absolute promise to accept his bill, the drawer or any other person may shew such promise upon the exchange to get credit; and a third person who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and the acceptor. Per Lord Mansfield delivering the opinion of the court in *Mason v. Hunt*, B. R. M. 20 G. 3. Doug. 299. See also *Pierson v. Dunlop* and another, Cowp. 571. and *Le Blanc J.* in *Johnson v. Collings*, 1 East's R. 105. and Lord Ellenborough C. J. in *Clarke v. Cock*, 4 East's R. 70.

many cases, that a promise, *that a bill when due shall meet due honour*, amounts to an acceptance, and that without sending it for a formal acceptance in writing, that it would be wasting words to refer to the books on this subject; then here was an undertaking by the defendant in writing, by a collateral paper, to accept the bills, which induced a credit, without which the plaintiffs would not have given value for them. The defendant has thereby enabled another, with truth, to assert, (and furnished him with the means of proving that assertion by the production of the defendant's letter,) that he had undertaken to accept the bills, which, in ordinary mercantile understanding, amounts to an acceptance, and by that, credit was attached to the bills. This acceptance, being by writing, comes within all the cases cited. It would be good according to some, even by parol, but that an acceptance is good by collateral writing, is clear from *Pillans v. Van Mierop*^f, and other cases."

A bill was drawn as follows^g: "To Mr. Withy; Sir, please to pay to Mr. Scot or order 30*l.* Thomas Newton." Scot endorsed to the plaintiff, who presented the bill to the drawee (the defendant) for acceptance, and the defendant underwrote thus, "Mr. Jackson, please to pay this note, and charge it to Mr. Newton's account, R. Withy."—It was insisted, that this was not an acceptance, for the defendant did not mean to become the principal debtor. It was only a direction to Jackson to pay 30*l.* out of a particular fund, and if there was not any such fund, the money was not to be paid. But per Cur. the underwriting is a direction to Jackson to pay the sum; and it signifies not to what account it is to be placed when paid; that is a transaction between them two only, and this is clearly a sufficient acceptance.

In like manner it has been holden, that a letter, written *after the bill was drawn*^h, stating, that the holder might rest satisfied of payment, amounted to an acceptance.

It will be proper to remark here, that, in all the preceding cases, the bills were in existence at the time when the promises to accept were given. This circumstance ought always to be attended to, for a promise to accept a bill, to be drawn at a future time, has been holden not to amount to an acceptance.

Endorsees against the acceptor of an inland bill of ex-

^f 3 Burr. 1663.

^g *Moor v. Withy*, Bull. N. P. 270.

^h *Wilkinson v. Lutwidge*, Str. 649.
Raymond C. J. London Sittings.

change¹. A. having furnished goods to the defendant to the amount of the bill in question, applied to him for payment, when the defendant said, that if he would draw on him a bill at two months for the amount, he should then have money, and would pay it. A. afterwards drew the bill in question at two months, payable to his own order; but it was not presented to the defendant for acceptance, nor did he ever, in fact, accept it otherwise than as is before stated. A. the payee, having endorsed the bill, passed it to plaintiffs in discharge of an old debt; but there was not any communication at the time between the plaintiff and defendant. A. becoming a bankrupt before the bill became due, defendant refused payment. *Le Blanc J.* at Worcester assizes, being of opinion, that the promise of the defendant did not amount to an acceptance, nonsuited the plaintiffs. On a motion to set aside the nonsuit, (after argument in support of the rule, the counsel on the other side having been stopped by the court,) *Lord Kenyon C. J.* said, this was a promise to accept a *non-existing* bill, and that he did not know by what law he could say that such a promise was binding as an acceptance. *Grose J.* said, that by the general rule a chose in action was not assignable, except by the custom of merchants; that the assignment of a chose in action by a bill of exchange was founded on that law, and could not be carried further than that would warrant it, and that there had not been cited any authority to shew that by the law merchant a mere promise to accept a bill to be drawn in future, amounted to an actual acceptance of the bill when drawn. *Per Cur.* rule discharged.

Upon a request to A. to accept a bill², and draw upon B. for the sum, the mere act of drawing on B. does not amount to an acceptance.

A bill of exchange, drawn on the defendant, was left with him for acceptance by the plaintiff's clerk¹; the next day he called for the bill, when the defendant returned it, saying, "There is your bill, it is all right." *Lord Kenyon C. J.* ruled that these words could not by any implication amount to an acceptance; that they did not convey any evidence of the defendant's intention to bind himself to the payment of the bill at all events, which was necessary for the purpose of charging him as an acceptor.

When a bill has been accepted by the drawee, if another

¹ *Johnson and another, v. Collings*, 1 East's R. 98.

another, B. R. T. 26 G. 3. 1 T. R. 269.

² *Smith and another v. Nissen and Powell v. Jones*, 1 Esp. N. P. C. 17.

person accepts it also for the purpose of guaranteeing the first acceptor, the second acceptance is merely a collateral undertaking, and must be declared on as such; for there is not any custom of merchants authorizing a series of acceptors^m.

Qualified Acceptance.—A *qualified acceptance* is, when the drawee undertakes to pay the bill in any other manner than according to the tenor and effect thereof. This species of acceptance, if qualified with a condition, is called a *conditional acceptance*. The holder of the bill may consider a qualified acceptance as a nullity, and protest the bill for non-acceptance, after which he is precluded from insisting upon it as an acceptanceⁿ (23); but if the holder acquiesces in it, then such an acceptance becomes absolute only on the performance of the condition (24), which must be averred in the declaration.

If a bill be accepted, payable at A.'s who is the acceptor's banker^o, the party taking such special acceptance, (which he is not bound to do) thereby impliedly agrees to present it for payment within the usual banking hours, at the place where it is made payable; and if he present it after such hours, without effect, it is no evidence of the dishonour of the bill so as to charge the drawer. But eight o'clock in the evening will not be considered as an unseasonable hour for demanding payment at the house of a private merchant who has accepted a bill^p.

The following cases will illustrate the nature of qualified acceptances.

^m Jackson v. Hudson, 2 Camp. N. P. C. 447.

ⁿ Sproat v. Mathews, 1 T. R. 182.

^o Parker v. Gordon, 7 East, 385.

^p Barclay v. Bailey, 2 Camp. N. P. C. 528.

(23) So if the acceptor of a bill cancels his acceptance^{*}, and the holder causes it to be noted for non-acceptance, he thereby precludes himself from contending, that an acceptance of a bill once made cannot be retracted in point of law. Whether an acceptance once made can be cancelled by the acceptor, while the bill remains in his hands, has not been solemnly decided. Lord Kenyon C. J. is said to have determined at *nisi prius*, that it could not. See 6 East's R. 200.

(24) If an agreement to accept is conditional, and a third person takes the bill, knowing of the conditions annexed to the agreement, he takes it subject to such conditions. Per Lord Mansfield C. J. delivering the opinion of the court in Mason v. Hunt, B. R., M. 20 G. 3. Doug. 299.

* Bentinck v. Dorrien, 6 East's R. 199.

Defendant accepted a bill of exchange to pay it *when goods consigned to him^q*, and for which the bill was drawn, *were sold*. Plaintiff counted upon the custom of merchants. After verdict for plaintiff, it was moved in arrest of judgment, that this acceptance, depending on the contingency of the sale of goods, was not within the custom of merchants or negotiable. But *the court* (after consideration) held it good; for though the plaintiff might have refused to take such an acceptance, yet he might submit to take it. And it would affect trade, if factors were not allowed to use this caution, when bills are drawn before they have an opportunity to dispose of the goods.

So where defendant accepted a bill of exchange *upon account of the ship Thetis, when in cash for the said vessel's cargo^r*, and plaintiff averred, that at the day when the bill became payable, the defendant was in cash for the said ship's cargo; it was objected, in arrest of judgment, that the defendant was not liable by this conditional acceptance; but the court overruled the objection.

So an answer, that the bill would not be accepted till a navy bill was paid^s, was holden a conditional acceptance to pay when the navy bill should be discharged.

Whether an acceptance be conditional or absolute, is a question of law^t.

Defendant accepted a bill of exchange to pay part of the sum of money mentioned in the bill^u, this was holden to be valid, although it was contended, that such partial acceptance was not within the custom of merchants.

Liability of the Acceptor.—The acceptor, by reason of his acceptance, which is *prima facie* evidence of his having, in his hands, effects of the drawer to answer the amount of the bill, is considered as the principal debtor, and primarily liable to all the parties to the bill; and an express agreement only will discharge him. The acceptor undertakes to pay the sum specified in the bill, and interest, according to the legal rate of interest where the bill becomes due; but his engagement does not extend any further; consequently the acceptor of a foreign bill is not liable for re-exchange^v. It never was doubted, that any party to the bill (except the drawer) might maintain an action against the acceptor, if the bill was not duly honoured. And in *Parminster v. Sye*

^q *Smith v. Abbott*, Str. 1152.

^r *Julian v. Shobrooke*, 2 Wils. 9.

^s *Pierson v. Duulop*, Cowp. 571.

^t *Sproat v. Mathews*, 1 T. R. 182.

^u *Wegerstoffe v. Keene*, Str. 214.

^v *Wookey v. Crawford*, 2 Camp. N. P. C. 445.

mons, D. P. 22 February, 1748,^y it was solemnly determined, that the *drawer* of a bill of exchange (accepted generally by the drawee, having effects of the drawer in his hands, and protested by the payee for non-payment, and afterwards paid by the drawer) might maintain, in his own name, and without an assignment from the payee, a special action on the case against the acceptor, and recover the money so paid.

If the holder of a bill of exchange bring separate actions against the acceptor^z, drawer, and endorsers, at the same time, the court will stay the proceedings in any stage of the action against the drawer, or any of the endorsers, upon payment of the amount of the bill and costs of that particular action; but will not stay proceedings in the action against the acceptor, except on the terms of his paying the costs in all the actions, because he is the original defaulter and the occasion of all those costs.

The holder of a bill of exchange^a, having been informed that the acceptor had not received any consideration for it, and that he had accepted the bill merely to accommodate the drawer, for several years after it became due, received interest upon the bill from the drawer, and neglected to call upon the acceptor for payment. At length he brought an action against the acceptor, and it was holden, that it would well lie; and Buller J. said, that nothing but an express agreement would discharge an acceptor; and the plaintiff's conduct in this case only meant, that he would try to recover the amount of the bill from the drawer, who was the true debtor, if he could.

The holder of the bill may discharge the acceptor by parol^b.

Non-acceptance and Notice thereof.—If a bill is presented, and an acceptance refused, or qualified acceptance only offered, or any other default made, due diligence must be used in giving notice thereof to the drawer, if the holder means to resort to him for payment; and this rule ought to be observed, although the bill presented for acceptance be a bill payable at a certain time after date; for although it be not necessary to present a bill of this description for acceptance at all, yet if it be presented and dishonoured, notice

^y *Parminster v. Symons, & Bro.* P. C. 604. affirming judgment of the court of King's Bench, which is reported in 1 Wils. 185.

^z *Smith v. Woodcock, Same v. Dudley,*

⁴ T. R. 691. Confirmed in Anonym. H. 40 G. 3. B. R.

^a *Dingwall v. Dunster,* Doug. 247.

^b *Whatley v. Tucker,* 1 Camp. N. P. C. 35.

becomes requisite in the same manner as upon non-payment; and it is not sufficient to give notice of the non-acceptance at the same time with the notice of non-payment^c.

The notice of the dishonour, which may be by letter^d, must be given within a reasonable time^e. What is reasonable time appears to be a question of law dependent on facts, viz. the situation of the parties, the place of their abode, and the facility of communication between them.

Where the parties reside in London, each party has a day to give notice^f.

In *Muilman v. D'Eguino*, 2 H. Bl. 565. which was the case of a foreign bill drawn payable in the East Indies, a certain time after sight; the court determined, that it was not necessary to send notice of the dishonour by an accidental foreign ship, which sailed thence, not direct for England; but that it was sufficient to have sent notice by the first regular English ship which sailed for England, considering the latter in the nature of the regular post between the two countries.

Notice to Drawer.—The rule which requires notice to be given within a reasonable time *by the holder* (25) of a bill of exchange *to the drawer*, of the drawee's refusal to accept, is calculated for the benefit of the drawer, in order that he may, upon receiving such notice, withdraw his effects out of the hands of the drawee. On this rule, however, an excep-

c *Roscow v. Hardy*, 2 Camp. N. P. C. 458.

d *Adm. per Ellenborough C.J.* 5 Esp. N. P. C. 157.

e *Darbishire v. Parker*, 6 East's R. 2.
f *Smith v. Mallett*, 2 Camp. N. P. C. 208. See also *Jameson v. Swinton*, 2 Camp. N. P. C. 373.

(25) In *Shaw v. Croft*, sittings after T. 1798, Chitty on Bills, 98. Kenyon C. J. said, that it did not make any difference who gave notice *to the drawer* of the dishonour of the bill; and there ruled a notice from the acceptor sufficient, observing, that the only end of the notice was, that the drawer might have recourse to the acceptor. See also *Jameson v. Swinton*, 2 Camp. N. P. C. 373. where Lawrence J. ruled, that the drawer, who had received due notice of dishonour from the first indorsee, was liable to the second indorsee, who had merely given notice to his indorser. But see *ex parte Barclay*, 7 Ves. jun. 598; contra, per Eldon Ch.—It may be observed, that in the case of *ex parte Barclay*, the attention of the court was not directed to Lord Kenyon's opinion in *Shaw v. Croft*.

tion has been engrafted^g, viz. that it is not necessary to give such notice to the drawer, where the drawer has not any effects in the hands of the drawee *at the time when the bill is drawn* (26); because, in this case, the drawer cannot sustain any injury from the want of such notice (27); but if the drawer has effects in the hands of the drawee, *at the time of the bill drawn*^h, though it does not appear to what amount, and though such effects are withdrawn before the bill can be presented, the circumstance of there not being effects in the hands of the drawee, *at the time when the bill is presented* for acceptance and refused, will not supersede the necessity of notice; for it would be very dangerous and incon-

^g *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652. *Rogers v. Stephens*, 2 T. R. 713. ^h *Orr v. Maginnis*, 7 East, 359. *Blackhan v. Doren*, 2 Camp. N. P. C. 503.

(26) "It is not necessary to say, whether the rule which dispenses with notice in cases where the drawer has no effects in the hands of the drawee, was wisely adopted or not. That rule certainly proceeds upon the ground of fraud in the drawer: and the courts have said, that, where the drawer has been guilty of fraud, he shall not claim the protection of those rules, which were introduced for the benefit of drawers acting *bona fide*. When a person draws a bill upon another, who has no effects in his hands, he is not entitled to notice of its being dishonoured, since he must know without such notice, that funds have not been provided to answer it." Per Chambre J. in *Clegg v. Cotton*, 3 Bos. & Pul. 239.

(27) In *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652. Eyre C. J. said, it might be a proper caution to bill-holders not to rely on it as a general rule, that if the drawer had not any effects in the hands of the acceptor, notice was not necessary. The cases of acceptances on the faith of consignments from the drawer not come to hand, and the case of acceptances on the ground of fair mercantile agreements, might be stated as exceptions, and there might possibly be many others. See also *Clegg v. Cotton*, 3 Bos. & Pul. 239. where A., the agent in America of B. in England, drew a bill upon B. and endorsed it to C., also residing in America, who endorsed it over. Before the bill became due, A. having reason to believe that B. would fail, lodged property belonging to B. in the hands of C. to answer the bill in case it should be returned; C. undertaking to restore the same, whenever it should appear that he was exonerated from the bill. Acceptance and payment of the bill were refused, but no notice was given to A.; held, that A. was discharged; Heath J. observing, that no doubt the rule dispensing with notice proceeded on the ground of a supposed fraud; but that ground was not applicable to a case where an agent drew upon his principal, unless under very particular circumstances.

venient, merely on account of the shifting of a balance to hold notice not to be necessary; it would be introducing a number of collateral issues, in every case upon a bill of exchange to examine how the account stood between the drawer and drawee, from the time the bill was drawn, down to the time it was dishonoured.

The insolvency of the acceptor¹, although within the knowledge of the drawer, will not supersede the necessity of notice to the drawer of the dishonour of the bill.

It is observable, that, although the holder may have lost his remedy against the drawer, by laches, in not giving notice, yet a subsequent promise to the holder, by the drawer, that he will see the bill paid, will enable the holder to maintain an action on the bill².

Notice to Endorser.—If the holder of a bill of exchange looks to the endorser for payment, it is incumbent on him to give notice of the dishonour of the bill within a reasonable time, otherwise the endorser will not be liable.

In *Blesard v. Hirst* and another, 5 Bur. 2670. it was holden, that the endorsee of an inland bill of exchange, who had neglected to give notice to his endorser of the drawee's refusal to accept until a month had elapsed, in the course of which the drawer became a bankrupt, could not recover against such endorser (28).

The holder of a bill before it was due having tendered it for acceptance, which was refused, kept it till due, *without giving notice of non-acceptance*, when it was tendered for payment and refused, and then immediately returned it on the second endorser, who not knowing of the laches took up the bill; it was holden, that his ignorance of the laches of the former holder did not entitle him to recover against the first endorser who set up such defence¹.

With respect to the drawer, it has been observed, that want of effects in the hands of the drawee, at the time of bill drawn, will supersede the necessity of notice; but with respect to the endorser, as he has not any concern with the

¹ *Esdaile v. Sowerby*, 11 East, 114.

¹ *Roscow v. Hardy*, 12 East, 434.

² *Hopes v. Alder*, 6 East's R. 16 n.

See also post, p. 305.

(28) Lord Mansfield C. J. said, in this case, 5 Burr. 2672, that there was not any difference in this respect between an inland and a foreign bill.

accounts between the drawer and drawee, notice of non-acceptance must be given to him by the *holder* of the bill (29), although the drawer has not any effects in the hands of the drawee^m (30).

A subsequent promise by the endorser, is a waiver of the objection for want of noticeⁿ, and it is immaterial whether such promise be made to the plaintiff, or to a third person^o who held the bill at the time; but a subsequent proposal by the endorser to pay the bill by instalments, *made without knowledge of all circumstances* relative to the bill having been dishonoured, has been holden not to be a waiver of the objection for want of notice^p.

It is observable, however, that the rule requiring notice to be given even to the endorser, is applicable only to fair

^m Goodall v. Dolley, 1 T. R. 712.

Wilkes v. Jacks, Peake's N. P. C.

202. S. P. Per Kenyon C. J.

ⁿ Peake's N. P. C. 202. Lundie v.

Robertson, 7 East, 231. S. P. recog-

nized in Jones v. Morgan, 2 Camp. N. P. C. 475.

^o Potter v. Rayworth, 13 East, 417.

^p Goodall v. Dolley, 1 T. R. 712. De

Bert v. Atkinson, 2 H. Bl. 336.

(29) In Tindal v. Brown, 1 T. R. 167. an action was brought by endorsee against endorser of a promissory note. The defendant had, within a reasonable time after default of payment of the note, received notice thereof from the maker; but the plaintiff, the holder, had not given the defendant notice until two days after the bill became due. On this ground the court held, that the plaintiff could not recover, and that due notice ought to be given by the holder himself to the endorser within a reasonable time after default of payment; Butler J. observing, "that the purpose of giving notice to the endorser, is not merely that the endorser should know that the note is not paid, for *he is chargeable only in a secondary degree*; but to render him liable, you must shew that the holder looked to him for payment, and gave him notice that he did so. The notice by another person to the *endorser*, can never be sufficient; but it must proceed *from the holder* himself." The preceding case of Tindal v. Brown was cited by Eldon Ch. in *ex parte* Barclay, 7 Ves. jun. 598. and the same rule was applied by him to the case of the drawer, thereby over-ruling the opinion of Lord Kenyon C. J. in Shaw v. Croft, Chitty, 98. and ante p. 302. n. which case, however, was not noticed either in the argument or by the court in *ex parte* Barclay.

(30) The exception to the general rule dispensing with notice where there are not effects in the hands of the drawee, is confined to actions brought against the drawer, and the endorser is in all cases intitled to notice. Per Lord Kenyon C. J. in Wilkes v. Jacks, Peake's N. P. C. 202.

transactions where the bill has been given for value in the ordinary course of trade (31).

In addition to notice, it was formerly holden, that an endorsee could not sue his endorser until he had demanded payment of the drawer, on the ground, that the endorser was only a warrantor for the payment of the drawer; but this doctrine has been overruled, and it is now settled, as well in the case of a foreign as in that of an inland bill, that such a demand is not necessary, as appears from the following cases.

Case on a foreign bill of exchange by an endorsee against the endorser¹. On general demurrer, it was objected that plaintiff had not shewn a demand on the drawer, in whose default only the endorser warrants. After two arguments, the court was of opinion, that the declaration was good enough; that to require a demand upon the drawer, would be laying such a clog on these bills as would deter all persons from taking them; that as to the notion which had prevailed, that the endorser warrants only in default of the drawer, there was not any colour for it; for every endorser was in the nature of a new drawer, and at *nisi prius* the endorsee was never put to prove the hand of the first drawer.

The same point was ruled in the case of an inland bill of exchange, in *Heylin v. Adamson*, B. R. M. 32 Geo. 3. 2 Burr. 669 (32).

q *Bromley v. Frazier*, Str. 441.

(31) In an action against the payee of a note, it appeared, that the note was not presented for payment till the day after it became due, and that no notice was given till five days after such presentment; but it also appearing, that the defendant gave no value for the note, that he lent his name merely to give it credit, and that he knew at the time that the maker was insolvent, it was holden, that the plaintiff was entitled to recover. *De Bert v. Atkinson*, 2 H. Bl. 336. So in *Sisson v. Thomlinson*, London sittings, 17th December, 1805, MSS. Lord Ellenborough C. J. ruled, on the authority of the preceding case, that where the endorser has not given any consideration for a bill, and knows at the time that the drawer has not any effects in the hands of the drawee, he (the endorser) is not entitled to notice of the non-payment as a *bona fide* holder for a valuable consideration would be. But see *Smith v. Becket*, 13 East, 187. and *Brown v. Maffey*, B. R. 52 G. 3.

(32) There is a dictum of Lord Hardwicke Ch. to the same effect in *Lake v. Hayes*, H. 1736 1 Atk. 281. assigning the same reason, viz. that every endorser is as a new drawer.

Foreign bills of exchange ought to be presented to the drawee, by a notary public (to whom credit is given, because he is a public officer) and acceptance demanded^r. If the drawee refuses to accept the bill^b, then the notary ought to draw a protest for non-acceptance(33).

Protest.—A protest on an inland bill of exchange was not necessary until the latter end of King William's reign. The frequent delays of payment of such bills having been found to be very inconvenient in the course of trade and commerce, it was enacted by stat. 9 & 10 W. 3. c. 17. that “where bills of exchange (of 5*l.* or upwards, payable at a certain time after date^t, and expressed to be for value received,) are drawn in, or dated at, any place in England, Wales, or Berwick-upon-Tweed, upon any persons or in any other place, in such cases, after presentation and acceptance, *by underwriting* the bills under the parties' hands, and after the expiration of three days^u after the time when the same shall be due, on refusal or neglect of payment thereof, the party, to whom the said bill is made payable, his agent,

^r Per Buller J. in *Leftley v. Mills*, 4 T. R. 175.

^b Per Holt C. J. 6 Mod. 29. *Buller v. Cripps*.

^t This act does not extend to bills payable after sight. *Leftley v. Mills*, 4 T. R. 170.

^u See 4 T. R. 170.

(33) In *Cromwell and another v. Hynson*, 2 Esp. N. P. C. 511. Kenyon C. J. ruled, that when notice of non-acceptance was given to the endorser of a foreign bill, it was not necessary that such notice should be accompanied with a copy of the protest for non-acceptance. The case of *Goostrey v. Mead*, Gilb. Evid. Ed. 1761. p. 79. and Bull. N. P. 271. seems to be at variance with this decision of Kenyon C. J. A. drew a bill of exchange in the West Indies on T. in London, at 60 days sight, payable to W. or order; W. endorsed to G., who presented the bill to T., who refusing, G. noted it for non-acceptance, and at the end of sixty days protested it for non-payment, and then wrote a letter to A., and also to his agent in the West Indies, acquainting them that the bill was not accepted. In an action brought against A. by G., on this case he was non-suited, “for, *by not sending the protest* for non-acceptance, he made himself liable.” The only way in which this case can be reconciled with Lord Kenyon's decision is, by considering the expressions used in the latter case, “not sending the protest,” as meaning nothing more than “not giving notice of the non-acceptance.” “The requiring a protest for non-acceptance is, not because a protest amounts to a demand, *for it is only giving notice to the drawer* to get his effects out of the hands of the drawee.” Per Cur. in *Bromley v. Frazier*, Str. 442.

“ cause the same to be protested for *non-acceptance*, as in
 “ case of foreign bills of exchange. The protest to be made
 “ by such persons as are appointed by the stat. of W. 3.
 “ to protest for non-payment, and 2s. only to be paid for
 “ it.”

Sect. 5. “ Provided, that no acceptance of such bill shall
 “ be sufficient to charge any person, unless the same bill be
 “ underwritten or endorsed in writing thereupon (37), and
 “ if such bill be not so accepted, the drawer shall not be lia-
 “ ble to pay any costs, damages, or interest, unless such pro-
 “ test be made for non-acceptance thereof, and within 14
 “ days after such protest, the same be sent, or otherwise
 “ notice thereof be given, to the party from whom such bill
 “ was received, or left in writing at the place of his or her
 “ usual abode; and if such bill be accepted, and not paid
 “ before the expiration of three days after the said bill shall
 “ become due, the drawer shall not be liable to pay any
 “ costs, damages, or interest, unless a protest be made and
 “ sent, or notice thereof given, in manner and form above
 “ mentioned; nevertheless, every drawer of such bill shall
 “ be liable to make payment of costs, damages, and interest,
 “ upon such inland bill, if any one protest be made of non-
 “ acceptance or non-payment thereof, and notice thereof be
 “ sent, given, or left as aforesaid.”

Sect. 7. “ If any person accept any *such* bill (38) in satis-
 “ faction of any former debt or sum of money, formerly due
 “ unto him, the same shall be esteemed a complete payment
 “ of such debt, if such person doth not take his due course
 “ to obtain payment thereof, by endeavouring to get the
 “ same accepted and paid, and make his protest, as afore-
 “ said, either for non-acceptance or non-payment thereof.”

(37) “ If these words stood singly, it would be hard to say that
 any remedy lay against the acceptor by reason of a *parol* accept-
 ance; but the generality of these words is restrained by the words
 that immediately follow, so that the first general words are only to
 be understood to relate to the charging the drawer with interest
 and costs.” Cas. Temp. Hardw. 78. Per Lord Hardwicke in
 Lumley v. Palmer.

(38) That is, a bill for 5l. or upwards, payable after date, and
 expressed to be for value received, see s. 4.

Formerly, a bill given in payment of a precedent debt, was not
 considered as payment, unless the money was paid by the drawee,
 although the holder had neglected to present it for payment, or
 to give notice of non-payment. See 12 Mod. 203. Ca. Temp.
 Holt, 299. Salk. 124.

Sect. 8. " Provided, that nothing herein contained shall
 " extend to discharge any remedy (39) that any person may
 " have against the drawer, acceptor, or endorser of such
 " bill."

" In case any *inland* bills of exchange^a (for 5*l.* or upwards,
 " payable at a certain time after date, and expressed to be
 " for value received) be lost or miscarried within the time
 " before limited for payment, the *drawer* shall give
 " other bills of the same tenor with those first given, the
 " persons to whom they shall be so delivered giving security
 " to the drawer to indemnify him in case the bills shall be
 " found again."

The *endorsee* of a lost bill, where the bill has been endorsed in blank, cannot recover at law, against the acceptor, although a sufficient indemnity is tendered^b; he must resort to a court of equity for relief^c. But where the bill lost had only a special endorsement upon it, an action may be maintained, without producing the bill^d.

Liability of the Drawer on Non-acceptance.—If the drawee, on presentment for acceptance, dishonour the bill, the drawer may be called on for immediate payment (40) In *Milford v. Mayor*, Doug. 55. where the defendant was holden to bail, on an affidavit of debt, on a bill of exchange, drawn by defendant and endorsed to plaintiff, although the bill was not due at the time of the arrest, yet the drawee

^a 9 & 10 W. 3. c. 17. s. 3.

^b *Pierson v. Hutchinson*, 2 Camp. N. P. C. 211.

^c See *Walmsley v. Child*, 1 Ves. 341. and *Exp. Greenway*, 6 Ves. jun. 812.

^d *Long v. Bailie*, 2 Camp. N. P. C. 214. n.

(39) " The construction of this clause is, that it relates to the remedy for the principal sum in the bill, for these two acts (*viz.* 9 & 10 W. 3. c. 17. and 3 & 4 Ann. c. 9.) relate to and make a provision for protests, which are to be followed with interest, damages, and charges upon the drawer; and, therefore, this is a very natural proviso, that this should not extend to discharge any remedy that they might have for the principal sum, though there were no such protest." Per Lord Hardwicke C. J. in *Lumley v. Palmer*, Ca. Temp. Hardw. 78.

(40) A foreign bill of exchange was drawn payable at 120 days after sight, but when the bill was presented for acceptance, that was refused; upon which an action was immediately brought against the drawer, without waiting till the expiration of the 120 days. On the trial, the defendant objected, that he was not liable until the expiration of the 120 days, and offered to call evidence to

having dishonoured the bill, the court refused to discharge the defendant (41). And in *Ballingalls and another v. Gloster*, B. R. E. 43 G. 3. 3 East's R. 481. it was adjudged, that the endorsee of a foreign bill of exchange might bring an action against the person who had endorsed it to him, immediately on the non-acceptance of the drawee, although the time for which the bill was drawn was not elapsed, on the ground, that every endorser was in the nature of a new drawer. And Lord Ellenborough C. J. said, that, in a late case tried before him at Guildhall, it appeared to be the universally received law on the Continent, that an endorser was liable immediately on the non-acceptance of the drawee.

V. Of the Transfer of Bills of Exchange.—Of the Party in whom the Right of Transfer is vested.

BILLS payable to order (42) or to bearer, are negotiable, and the transfer of them for a good and valuable consideration vests a right of action in the assignee. It is a rule of the common law, that choses in action are not assignable; but in the case of bills of exchange there is an exception to this rule, and in favour of commercial intercourse they are, by the custom of merchants, assignable to a third person not named in the bill, or party to the contract, so as to vest in

prove, that the custom of merchants was such. But Lord Mansfield C. J. said, the law was clearly otherwise, and refused to hear the evidence. *Bright v. Purrier*, London Sitings after Trin. 5 Geo. 3. Bull. N. P. 269. cited by Ellenborough C. J. in *Ballingalls v. Gloster*, 3 East's R. 483.

(41) In *Macarty v. Barrow*, B. R. E. 6 Geo. 2. Str. 949. (more fully and accurately reported from a note supplied by Wilmot C. J. in 3 Wils. 17. and from Ford's note, in 7 East, 437. n. (a) and recognized in *Francis v. Rucker*, Ambl. 672.) The defendant having drawn bills on Spain, which were afterwards protested for non-acceptance, became a bankrupt before they were returned, and, being arrested, he was discharged, upon motion, on the ground that it was a debt contracted before the bankruptcy, and at the very instant when the bills were drawn.

(42) It must be observed that the endorsement of a bill which has not the words "or to his order" is good, or of the same effect between endorser and endorsee to make the endorser chargeable to the endorsee. Per Holt C. J. *Hill v. Lewis*, Salk. 133.

the assignee a right of action *in his own name*. Whether a bill of exchange be negotiable or not, is a question of law^e.

In respect of bills payable to order, the custom has directed, that the assignment should be made by a writing on the bill, called an endorsement; and in respect of bills payable to bearer, that the assignment should be constituted by delivery only (43). A transfer of a bill of exchange by endorsement is an act similar in effect to making a new bill, the endorser being in the nature of a new drawer^f.

Endorsements are of two kinds, 1st. blank, 2d. in full.—An endorsement in blank, which is the most common, is made by the writing the endorser's name on the back of the bill, without any mention of the name of the person in whose favour the endorsement is made (44).

If A. the payee of a bill of exchange endorses it in blank^g and delivers it to B., and B. writes, above A.'s endorsement,

^e Grant v. Vaughan, 3 Burr. 1523. 1526.
1528.

^f Per Holt C. J. Skin. 411. Hard-
wicke Chr. 1 Atk. 282. Lord Mans-

field C. J. 2 Burr. 674. Lord Ellen-
borough C. J. 3 East. R. 482.

^g Vincent v. Herlock, 1 Camp. N. P.
C. 442.

(43) If a bill be payable to A. or bearer, and A. delivers it over for money received without endorsement, this is a sale of the bill, and the seller does not become a new security; but if he had endorsed it, he had become a new security, and then he had been liable upon the new endorsement. Per Holt C. J. Governor and Company of the Bank of England v. Newman, Lord Raymond, 442.

(44) Endorsements, either blank or special, subsequent to a blank endorsement by the payee, may be struck out even at the trial^{*}; consequently a remote endorsee may declare as the immediate endorsee of the payee or first endorser.

Endorsees of a bill of exchange against acceptor. The bill was endorsed in blank by the payee, and after several endorsements it came to one Jackson a bankrupt, (whose assignees had indemnified defendant) under a special endorsement to him or order. Jackson, without endorsing the bill, sent it to Muir and Atkinson, who discounted it with plaintiffs. Plaintiffs had struck out all the endorsements except the first. Per Lord Kenyon C. J. "The fair holder of a bill may consider himself as the endorsee of the payee, and strike out all the other endorsements. This special endorsement being made after the payee had endorsed it, cannot affect the title of the present plaintiffs." Smith and others v. Clarke, Sittings for London after T. 34 Geo. 3. Peake's N. P. C. 225. 1 Esp. N. P.

* Theed v. Lovel, Str. 1108.

"pay the contents to C." without subscribing his own name, B. is not liable to C. as an endorser of the bill; for, in order to make a party liable as an endorser, his name must appear written with intent to endorse.

An endorsement in full, or special endorsement, mentions the name of the endorsee, as thus, "Pay the contents to A. B." and is subscribed with the name of the endorser (45).

It is not necessary that in an endorsement of this kind the words "or order" should be subjoined to the name of the endorsee; for if a bill be drawn payable to order, the negotiability of the bill will not be restrained by the omission of

C. 180. S. C. So where there were several blank endorsements intermediate between the endorsement by the payee and the endorsement by the defendant, and plaintiff declared that the payee endorsed the bill to the defendant, who endorsed it to plaintiff; this was holden good. *Chaters v. Bell*, 4 Esp. N. P. C. 210. Per Lord Ellenborough C. J.

(45) A full or special endorsement contains in itself a transfer of the interest in the bill to the person named in such endorsement. *Poth. Traité du Contrat de Change*, part 1. chap. 2. s. 23, 24. But a bare endorsement, without other words purporting an assignment, does not work an alteration of the property. Per Cur. *Lucas v. Haynes*, Salk. 130.

Clark having a bill of exchange payable to him or order, put his name upon it, leaving a vacant space above, and sent it to J. S. his friend, who got it accepted; but the money not being paid, Clark brought assumpsit against the acceptor. And it was objected, that the action should have been brought by J. S. But per Holt C. J., J. S. had it in his power to act either as servant or assignee. If he had filled up the blank space, making the bill payable to him, as he might have done if he would, that would have witnessed his election to have received it as endorsee. The property of the bill would have been transferred to him, and he only could have maintained this action against the acceptor; but since he has not filled up the blank space, his intention is presumed to act as servant only to Clark, whose name was put there; that on payment thereof a receipt for the money might be written over his name, and therefore the action is maintainable by Clark. *Clark v. Pigot*, Salk. 126. and 12 Mod. 192.

From the foregoing case it appears that a blank endorsement is an equivocal act, and that it is in the power of the party to whom the bill is delivered to make what use he pleases of such an endorsement. He may either use it as an acquittance to discharge the bill, or as an assignment to charge the endorser.

Promissory notes and bills of exchange are frequently endorsed in this manner, "pay the money to my use," in order to prevent their

the words "or order" in the endorsement, as will appear from the following cases:

Upon a case made at nisi prius^h, coram Pratt C. J. it appeared, that the plaintiff had declared on an endorsement made by A., whereby he appointed the payment to be to B., *or order*, and upon producing the bill in evidence, it appeared to be payable to A., or order, but the endorsement was in these words, "Pay the contents to B." and therefore it was objected, that the endorsement, not being to order, did not agree with the plaintiff's declaration; but, upon consideration, the whole court were of opinion, it was well enough, that being the legal import of the endorsement; and that the plaintiff might upon this have endorsed it over to another, who would be the proper order of the first endorser (46).

So where a foreign bill of exchange was drawn by A. on Bⁱ, payable to C, or order, and accepted by B., and C. endorsed it to D. without adding the words "or order," and D. afterwards endorsed it to E., who brought an action against B., the acceptor, for non-payment; evidence having been adduced at the trial of the usage of merchants with respect to endorsements of bills payable to order, where the words "or order" were omitted in the endorsement, which evidence was contradictory, some merchants declaring that the omission did not make any difference, others, that it restrained the negotiability of the bill, and made it payable to the endorsee only; the jury found a verdict for the defendant.—On a motion for a new trial, on the ground that evidence of

^h *Acheson v. Fountain*, 8tr. 557.

ⁱ *Edie v. E. I. Company*, 2 Barr. 1916. and 1 Bl. R. 295.

being filled up with such an endorsement as passes the interest. Per Lord Hardwicke Ch. in *Snee v. Prescott*, 1 Atk. 249.

"A bill, though once negotiable, is certainly capable of being restrained. I remember this being determined on argument. A blank endorsement makes the bill payable to bearer; but by a special endorsement the holder may stop the negotiability." Per Lord Mansfield C. J. *Anchor v. Bank of England*, Doug. 639.

(46) Before this decision in the case of *Acheson v. Fountain*, the same doctrine had been laid down with respect to a promissory note, in the case of *More v. Manning*, C. B. M. 5 Geo. 1. Comyn's R. 311. viz. that where a note is drawn payable to order, and the payee endorses it to A. (omitting the words "or order,") A. has (notwithstanding such omission) all the interest in the note, and may endorse it to B., who upon such endorsement may maintain an action against the maker.

the usage ought not to have been allowed; that the custom of merchants was part of the law of England, and that the law of England was fully settled on this point; the court were unanimous that a new trial ought to be granted; and *Ld. Mansfield C. J.* said, he was clear that the evidence ought not to have been admitted, for the law was fully settled in the cases of *More v. Manning*, and *Acheson v. Fountain*, ante. The other judges concurred, and *Denison J.* said, that there was not any instance of a restrictive limitation, where a bill was originally made payable to A., or order; that he had never heard of an endorsement to A. only, and that in general *the endorsement followed the nature of the thing endorsed.*

As a bill of exchange, payable to A.'s order, is, by the custom of merchants, payable to A., if he does not make any order: so by an endorsement of a bill of exchange to the order of A., A. is entitled to payment, if he makes no order.

A bill of exchange was drawn^k, payable to I. S., who endorsed it in this manner: "Pay the contents of the bill unto the order of Mr. Fisher." Fisher brought an action as endorsee, averring he had made no order to receive the money. The defendant demurred to the declaration, supposing that Fisher could not maintain the action, because the endorsement was not to him, *but to his order; sed per curiam*: The action is well brought against the endorser; for among tradesmen this form of endorsement is commonly used, although it is intended to be made payable to the person whose order is mentioned.

A bill payable to the *order* of A. is payable to A.^l, if he does not order it to be paid to any other person: and where no such order appears, it will be presumed that none was made.

Defendant had given a bill under his hand to pay to E. G. or order, a sum of money^m, and E. G. by endorsement ordered part of the money to be paid to plaintiff, upon which an action was brought; and a special custom among merchants was laid in the declaration according to the plaintiff's case: upon demurrer to an insufficient plea which defendant had pleaded, it was adjudged a void custom, and that the declaration was ill; for where a man's contract hath subjected him only to one action, it cannot be divided so as to subject him to two or more. It was admitted, however, that if the plain-

^k *Fisher v. Pomfret*, Carth. 403.
^l *Smith v. M'Clure*, 5 East, 476.

^m *Hawkins v. Cardy*, Salk. 65. Carth. 466. *Ld. Raym.* 360. S. C.

plaintiff had acknowledged the receipt of the residue, the declaration would have been good.

In order to derive a legal title to a bill of exchange payable to order, it is necessary for the endorsee, in an action against the acceptor, to prove the hand-writing of the payee or first endorser^a; and therefore, though the bill may come into the hands of another person of the same name with the payee, yet his endorsement will not confer a title, although the payee be not particularly described in the bill^b: such an endorsement, if made with the knowledge that he is not the person to whom the bill was made payable, is a forgery, through the medium of which a title cannot be derived.

With respect to bills payable to bearer, or bills payable to order, but endorsed in blank, both which pass by delivery; if an assignee takes them, without any knowledge (47) of defect of title, *bonâ fide*, and for a valuable consideration, such assignee is entitled to payment (48).

The following case, decided on a promissory note, will illustrate this position:

Trover for a bank note for 21*l.* 10*s.* payable to A., or bearer, on demand^c. A. being possessed of the note, sent it by the general post, under cover, to B. in Oxfordshire. The mail was robbed, and the note stolen. The note in question afterwards came into the hands of plaintiff for a valuable consideration, in the course of his business, and without notice that it had been stolen. The plaintiff having delivered the note to defendant, who was a clerk in the

^a *Smith v. Chester*, 1 T. R. 654.

^b *Miller v. Race*, 1 Burr. 452.

^c *Mead v. Young*, 4 T. R. 28. per three justices, Kenyon C. J. diss.

(47) See *Good v. Coe*, cited in argument, in *Boehm v. Sterling*, 7 Term B. 427. where the plaintiff had taken the note, on which he sued, for a valuable consideration, three months after it was due; and it appearing that the note had been lost by the true owners, and that the person from whom the plaintiff received it had notice of this, Lord Kenyon held, that the plaintiff was not entitled to recover.

(48) This proposition, as far as it affects bills payable after sight, or after date, and not on demand, must be understood with this restriction, viz. that the party seeking to recover on such bills has not taken them after they became due; for in that case he is subject to all the equity to which the party from whom he took it was liable. See ante note 47.

bank, for payment, he refused either to pay the money or re-deliver the note, whereupon this action was brought. On a case reserved, the court were of opinion, that plaintiff had sufficient property in the note to maintain this action; that a contrary determination would be attended with injurious consequences to commerce, since bank notes are constantly treated and considered as money, and paid and received as cash, and it was necessary that their currency should be established and secured. So where a bill of exchange with a blank endorsement had been lost by the holder, and afterwards was discounted by the plaintiffs (who were bankers) in the usual course of their business, without notice, for a person unknown to them, the plaintiffs were permitted to recover against the acceptor, upon proving the consideration which they had paid for the bill, which Kenyon C. J. thought necessary. N., the holder had advertised the bill, but it did not appear that plaintiffs had ever seen the advertisement.

Defendant, on the 22d October, 1763, gave Bicknell, who was husband of a ship belonging to defendant, a cash note, or check on his banker, which was worded thus: "Pay to ship Fortune or bearer, 70*l*." B. lost the cash note, which, having been offered to plaintiff, a grocer at Portsmouth, on the 25th October, 1763, in the course of business, he took it, *bonâ fide*, and gave a valuable consideration for it without notice of the loss. Defendant having directed his banker not to pay the cash note, an action was brought, and plaintiff declared, first, as on an inland bill of exchange, and, secondly, for money had and received. Verdict for defendant. A motion was made for a new trial, which, after argument, was granted; the court observing, that notes of this kind were negotiable by delivery, and as plaintiff came fairly by the note in question, for a valuable consideration, he was entitled to recover. And per Yates J. "It has been doubted, whether that species of action, where the plaintiff declares upon the note itself, as upon a specialty, was proper, but here is a count for money had and received. The question, whether plaintiff can maintain this action, depends upon the note's being assignable or not. The original advancer of the money manifestly appears to have had the money in the hands of the drawer; and therefore he was certainly entitled to bring this action; and if he transfers his property to another person, that other person may also maintain the

q *Lawson v. Weston*, 4 Esp. N. P. C. 56. r *Grant v. Vaughan*, 8 Burr. 1516. 1 Bl. R. 485. S. C.

like action. Bicknell must, under the circumstances of the case, be considered as having delivered this instrument to plaintiff, which is tantamount to endorsement; and there is not any doubt of his having come by it fairly, *bonâ fide*, and for a valuable consideration."

In an action by the endorsee against the drawer of a bill of exchange^a, if it appears that the defendant drew the bill without consideration, and under duress, or that he was defrauded of it^b, it is incumbent on the plaintiff to prove that he gave value for it, although it was endorsed to him before it became due.

Case on a bill of exchange, payable to I. S. or bearer, against the drawer^c. Upon evidence ruled by Lord Pemberton, that plaintiff must entitle himself to it on a valuable consideration (though among bankers they never make endorsements in such case), for if he come to be bearer by casualty, or knavery, he shall not have the benefit of it. A bank bill payable to A. or bearer, being given to A. and lost^d, was found by a stranger, who transferred it to C. for a valuable consideration. C. got a new bill in his own name. Per Holt C. J.—“A. may have trover against the stranger, who found the bill, for he had not any title, though payment to him would have indemnified the bank; but A. cannot maintain trover against C. by reason of the course of trade, which creates a property in the bearer.

A bill of exchange, payable to order, with a blank endorsement, stands on the same footing as a bill payable to bearer, both passing by delivery. On this principle, and the authority of the preceding cases of *Miller v. Race* and *Grant v. Vaughan*, it has been holden^e, that a bill with a blank endorsement having been stolen and negotiated, the innocent endorsee thereof, for a valuable consideration, without notice, might recover against the drawer.

Of the Party in whom the Right of Transfer is tested.—Defendant drew a bill of exchange upon A.^f payable at so many days sight to B. or order, for the use of C.; B. endorsed this bill to plaintiff, for value received: the bill was accepted, but payment having been refused, plaintiff brought this action as endorsee, against defendant as drawer. Defendant, after oyer of the bill, pleaded that C. (the *cestui*

^a *Duncan v. Scott*, 1 Camp. N. P. C. 100.

^t *Rees v. M. of Headfort*, 2 Camp. N. P. C. 574.

^e *Hinton v. ———*, 2 Show. 235.

^x *Anon. B. R. London Sittings*, M. 10 W. 3 Salk. 126. *Ld. Raym.* 738. S. C.

^y *Peacock v. Rhodes*, Doug. 632.

^z *Evans v. Cranlington*, B. R. T. 3 Jac. 2. Carth. 5.

que use) was an officer in the excise, and indebted to the king in such a sum, and that upon an exchequer process at the suit of the king, the sum mentioned in the bill was extended in his hands; upon demurrer, it was adjudged by the court for the plaintiff^a; first, because C. had an equitable and not a legal interest to have the money, for he could not maintain an action against the acceptor. Secondly, the endorsement was for value received of plaintiff by B., and so B. received the money to which C., as *cestui que use*, had an equity; but the sum demanded by plaintiff is not that sum, but another due to him for value received, in which sum C. was not concerned, for which reason the money now indemand was not extendible. This judgment was affirmed on error in the exchequer chamber. E. 2 W. & M. See 2 Vent. 307.

It is the constant usage of merchants for administrators to endorse and assign over bills of exchange^b, made payable to their intestate's order.

Where a bill of exchange has been endorsed by the payee to A. and B. as executors^c, they may declare as such in an action against the acceptor.

When a bill of exchange is drawn, payable to A. and B. or their order^d, and A. and B. are not partners; to make it negotiable, the bill should be endorsed by A. and B., such being the usage of merchants (49); but in such case if the bill be endorsed by A. in the name of himself and B., and afterwards the drawee accepts the bill so endorsed^e, it is not competent to him to object, that the bill has not been regularly endorsed. See *Porthouse v. Parker*, post. tit. Partners. S. IV.

^a E. 1 Will. & Mar. Holt C. J.

^b Per Denison J. 3 Wils. 4.

^c *King v. Thom*, 1 T. R. 487.

^d *Carvick v. Vickery*, Doug. 653 n.

^e *Jones v. Radford*, 1 Camp. N. P. C. 83 n.

(49) As the property in a bill of exchange passes to the holder, when he pays the consideration, and as endorsement is merely evidence of the transfer, a trader, who before his bankruptcy has parted with a bill for a valuable consideration, but omitted to endorse it, may endorse it after his bankruptcy; and such endorsement will be a sufficient title to the party to whom it was delivered. *Smith v. Pickering*, Peake's N. P. C. 50.

VI. Of Presentment for Payment, and herein of the Days of Grace—Non-payment and Notice thereof—Protest.

WHERE bills of exchange are drawn payable at usance (50), or a certain time after date, or after sight, such bills ought not to be presented for payment at the expiration of the time mentioned in the bills, but at the expiration of what are termed days of grace (51).

“ In case of foreign bills of exchange the custom is^a, that three days (52) are allowed for payment of them, and if they are not paid on the last of the said days, the party ought immediately to protest the bill, and return it, and by this means the drawer will be charged; but if he does not protest it the last of the three days, which are called days of grace, there, although he upon whom the bill is drawn fails, the drawer will not be chargeable; for it shall be reckoned his folly that he did not protest, &c. But if it happens that the last of the said three days is a Sunday, or a great holiday, as Christmas-day, &c. upon which no money used to be paid, there the party ought to demand the money on the second day; otherwise it will be at his own peril, for

^a Per Merchants, in evidence at Guildhall, Trin. 7 Wil. 3. coram Holt C.J. *Tassell v. Lewis*, *Ld. Raym.* 742.

(50) This term signifies the time, which, by the usage of the countries between which the bills are drawn, is appointed for the payment of them. *Poth. s. 15.* See a table of usances, *Chitty*, 142, 143. Usances are calculated exclusively of the date of the bill, *Chitty*, 143.

The computation of time, when expressed by months, is by calendar months, *Chitty*, 143. Where bills are payable so many days after sight, the days are computed from the day the bills are accepted or protested for non-acceptance.

(51) In an action against the drawer of a bill of exchange, the evidence being that the bill had been demanded from the acceptor on the day preceding the last day of grace; the plaintiff was nonsuited, *Wiffen v. Roberts*, *B. R. Middlesex Sittings*, *Kenyon C.J.* *H. 35 Geo. 3. 1 Esp. N. P. C.* 262.

(52) Three days, exclusively of the day on which the bill becomes due, every where, except at *Hamburgh*, where that day makes one of the days of grace, *Chitty*, 140.

the drawer will not be chargeable." Good Friday is to be considered as a Sunday or Christmas day^b.

The foregoing passage from Lord Raymond's Reports, mentions only foreign bills of exchange; but it was said by Lord Kenyon C. J. in *Brown v. Harraden*, 4 T. R. 152. that it had been settled for more than half a century, that inland bills of exchange were payable at the same time as foreign bills of exchange.

I am not aware that it has ever been solemnly decided, that days of grace are allowable on bills of exchange payable at sight. If the reader wishes to pursue the dicta on this subject, he will find them collected in Mr. Chitty's Treatise on Bills of Exchange, &c. p. 144, 145, 146. The weight of authority is in favour of such an allowance (53).

No debt arises upon a bill payable after sight until a presentment for payment, and consequently the statute of limitations will not operate as a bar to such bill, unless it has been presented for payment six years before the action commenced^c. A different rule holds with respect to promissory notes payable on demand; for, there the statute runs from the date of the note, and not from the time of the demand^d.

The acceptor of a bill of exchange^e, having or being presumed to have in his hands effects of the drawer, for the purpose of discharging the bill, is considered as the principal debtor, and is primarily liable; payment must, therefore, be demanded of the acceptor in the first instance, on the day when the bill becomes due; and, in case of refusal or default, due notice of such demand and refusal or default must be given to the drawer, within a reasonable time after such demand and refusal or default, in order that he may withdraw his effects as speedily as possible from the hands of the acceptor. Until these previous steps have been taken, the drawer cannot be resorted to for non-payment of the bill. The want of notice to a drawer who has effects in the hands of the acceptor, after dishonour of the bill, is considered as tantamount to payment by him.

In an action by the endorsee of a bill of exchange against

^b Stat. 39 and 40 G. 3. c. 42.

^c *Holmes v. Kerrison*, 2 Taunt. 323.

^d *Christie v. Fonsick*, C. B. London

Sittings after M. T. 52 G. 3. Sir J.

Mansfield C. J. M. S.

^e *Dagglish v. Weatherby*, 2 Bl. R. 747.

(53) Days of grace are not allowed on bills payable on demand, Chitty, 146.

the drawer^f, it appeared that the bill had been drawn on the 1st of March, 1806, by the defendant, on one Moses Agar, payable three months after date: and the plaintiff, having become the holder of it, had placed it in the hands of his bankers, Down and Co. On the 4th of June, when the bill became due, a clerk of Down and Co. presented it for payment; and it was dishonoured. On the 5th they returned it to the plaintiff, who by letter, put into the two-penny post on the 6th, gave notice to the defendant of the dishonour; the plaintiff living in London, and the defendant at Shadwell. The case was left to the jury on the question, whether the notice of the dishonour had been given in reasonable time; and the jury, being of opinion that it had, found a verdict for the plaintiff. And on motion for a new trial, on the ground that due diligence had not been used, the court refused the rule:—Le Blanc J. observing, that it could not be contended that a banker ought to give notice of the dishonour to any but his customer^g, for whom he held the bill; and he thought that the holder of a bill might avail himself of the conveyance by the two-penny post.

The distance at which the parties live from one another is immaterial, provided they are within the limits of the two-penny post; and it is sufficient if the letter be put into the receiving house in time for the party to have it on the day when he ought to have notice of dishonour^h.

Where there are several endorsements, and the holder gives notice of dishonour to his endorser, neither that endorser, nor any prior endorser, is bound to transmit the notice of dishonour on the very day on which he receives it. Each successive endorser will be considered as having used due diligence, if he transmit the notice of dishonour on the day after it is received, in a case where all the parties live in the same place; but if he neglect giving the notice on that day and the day after, it will be too late. In *Smith v. Mullett*, 2 Camp. N. P. C. 209. Lord Ellenborough said, that it was of great importance that there should be an established rule upon this subject, and he thought there could be none more convenient than that where the parties reside in London, each party should have a day to give notice. In that case the plaintiff had notice of dishonour on the Monday, and did not give notice to his endorser until the Wednesday; Lord Ellenborough ruled, that as a day had

^f *Scott v. Lifford*, 9 East, 347. 1 Camp. N. P. C. 246. S. C.

^h *Hilton v. Fairclough*, 2 Camp. N. P. C. 633.

^g See *Robson v. Bennett*, 2 Taunt. 388.

been lost, the notice was not given in due time.—In *Jameson v. Swinton*, 2 Camp. N. P. C. 373, the same rule was recognized by Lawrence J. viz. that each party to the bill has a day to give notice, with this addition, that a subsequent endorser may avail himself of a notice given by a prior endorser to the drawer; and that a notice given between eight and nine o'clock in the evening to a party living at Islington is given in due time. See 2 Taunt. 224. S. C.

The law merchant, however, respects the religion of different people; and consequently a person is not required to give notice of the dishonour of a bill on a day, when by the rules of his religion, it is unlawful to attend to secular affairs; e. g. a great Jewish festival^l.

If the drawee of a bill goes abroad, leaving an agent here in England with power to accept bills, by virtue of which power the agent accepts the bill in question, it is incumbent on the holder to present such bill to the agent for payment, if the drawee continues absent^k.

Where a bill is made payable at a banker's in the city of London, it is sufficient to present the bill for payment to a clerk of the banker at the clearing house^l. It is customary among the London bankers in their dealings with each other, not to pay any check which is presented by, or on the behalf of another banker, after four o'clock in the afternoon; but merely to give an answer to the person so presenting it, whether it is a good check or not: and in case the check is approved, a mark is made on it, either by the person presenting it or the person who gives the answer; and a check so marked is considered as entitled to a priority of payment on the next day. It is not necessary to present a check, so marked, for payment *at the banking house* on the next day; it is sufficient if it be presented *at the clearing house*^m.

Where the holder of a bill of exchange intends to sue any of the endorsers, it is incumbent on him first to demand payment from the acceptor, on the day when the bill becomes dueⁿ, and in case of refusal, to give due notice (54) thereof, within a reasonable time, to the endorser (55).

^l *Lindo v. Unsworth*, 2 Camp. N. P. C. 602. ^l *Reynolds v. Chettle*, 2 Camp. N. P. C. 596.

^k *Philips v. Astling*, 2 Taunt. 206.

^m *Robson v. Bennett*, 2 Taunt. 289.
ⁿ *Rushton v. Aspinall*, Doug. 679.

(54) Notice of dishonour must be given within a reasonable time.

Such demand, refusal, or default, and notice thereof, must be alleged in the declaration and proved. The reason on which this rule proceeds is this; the endorser is in the

The general rule, as it may be collected from *Tindal v. Brown*, 1 T. R. 167. seems to be with respect to persons living in the same town, that the notice shall be given by the next day; and with regard to such as live at different places, that it shall be sent by the next post. But if in any particular place the post should go out so early after the receipt of the intelligence, as that it would be inconvenient to require a strict adherence to the general rule, then, with respect to a place so circumstanced, it would not be reasonable to require the notice to be sent till the second post. In *Haynes v. Birks*, 3 Bos. & Pul. 599. where the bill, which was put by the plaintiff in the hands of his banker to present for payment, having been dishonoured in London about two o'clock on Saturday, and presented again at nine in the evening, by a notary, and notice given of the dishonour to the plaintiff on Monday at Knightsbridge, who gave notice to the endorser of it on Tuesday at noon in Tottenham Court Road, it was holden that this notice was reasonable notice; Lord Alvanley C. J. observing, that it did not appear, at what time on Monday the plaintiff received the notice from his banker; that he was not bound to be at home the whole of the day; and supposing him to have returned home late in that day, he was not bound to send a special messenger to the defendant; if he informed the defendant by the course of the post it was sufficient, and supposing him to have so done, the defendant would only receive his letter on Tuesday. The Chief Justice added, "There is not any law which requires notice to be given within any certain fixed time; it need not be given with all the dispatch which can possibly be used, but with all the dispatch that can reasonably be expected." Whether notice has been given within a reasonable time appears to be a mixed question of law and fact, or rather a question of law dependent on facts, viz. the situation and places of parties, post hours, and the like. See *Darbishire v. Parker*, 6 East's R. 3. where this question was agitated, and the cases on this point are collected.

(55) So before the endorsee of a promissory note payable to A. or order brings an action against the endorser, he must make a demand, or use due diligence to obtain payment from the maker of the note, per Lord Mansfield C. J. in *Heylin v. Adamson*, 2 Burr. 676-7. who added, that this was determined in C. B. on great consideration in *Pasch. 4 Geo. 2.* cited by Lee C. J. in *Collins v. Butler*, 2 Strange, 1087. But where the endorser has paid part of the money, that circumstance is sufficient to dispense with proving a demand on the maker of the note. Per Lee C. J. *Midd. sittings, B. R. Str. 1246.* It is not an excuse for not making a demand on a note or bill, or for not giving notice of non-payment, that the maker or acceptor has become a bankrupt, as many means may re

nature of a surety only, and his undertaking to pay the bill is not an absolute but conditional undertaking; that is, in the event of a demand made on the acceptor, (who is primarily liable) *at the time when the bill becomes due*, and refusal on his part, or neglect to pay. It is not necessary to make any demand on the drawer^o.

The notice of dishonour must proceed from the person who can give the drawer or endorser his immediate remedy on the bill.

In an action against the defendant as endorser of a bill^p, to prove notice of non-payment A, was called, who swore that he had been employed by the original parties to the bill to get it discounted; that when it became due, it was in the hands of one Abbott, to whom the plaintiff had endorsed it; that the day after, the witness met the defendant, and told him it had not been paid; that the defendant asked who held it, and that the witness answered, it lies at Messrs. Bond's, Abbott's bankers. Lord Ellenborough C. J.: "If you could make A, the agent of the holder of the bill, the notice would be sufficient: but in reality he was a mere stranger. The bill, when dishonoured, lay at the bankers of Abbott, with whom A. had no sort of connection. But the notice must come from the person who can give the drawer or endorser his immediate remedy upon the bill; otherwise it is merely an historical fact. In this case A. was not possessed of the bill, and had no control over it. The defendant, therefore, is not proved to have had any legal notice of the dishonour of the bill, and is discharged from the liability he contracted by endorsing it." Plaintiff non-suited.

Cases frequently occur, in which it is impracticable to make an actual demand; under these circumstances, due diligence to obtain payment from the acceptor is equivalent to a demand. In like manner where the residence of the endorser is unknown to the holder, if due diligence be used in discovering the place of residence, and notice is given as soon as that is discovered, it is sufficient^q.

^o Heylin v. Adamson, 2 Burr. 678.

^q Bateman v. Joseph, 12 East, 433.

^p Stewart v. Kennett, 2 Camp. N. P. C. 177.

main of obtaining payment by the assistance of friends or otherwise. Admitted in Russel v. Langstaffe, Doug. 515. and in Warrington v. Furber, 8 East, 245.

As the rule requiring notice is introduced for the benefit of the party to whom such notice is given, of course it may be waved by that party. *Quilibet potest renunciare juri pro se introducto*. In some cases the rule is dispensed with, as where the drawer has not any effects in the hands of the acceptor; for then the drawer is presumed to have notice that the bill will not be paid; besides, not having any effects to withdraw from the hands of the acceptor, he cannot sustain any injury from the want of notice. But the circumstance of the *endorser* having effects in the hands of the acceptor, will not entitle the drawer to notice, if the drawer has not any effects in the hands of the acceptor. This was decided in the case of *Walwyn v. St. Quintin*, 1 Bos. and Pull. 652. which was an action of *assumpsit* on a bill of exchange drawn by defendant on one Dean, (by whom it was accepted) in favour of Thomas, by whom it was endorsed to plaintiff. The bill was drawn to accommodate Thomas the endorser, who had placed securities on which he wished to raise money in the hands of the acceptor, but the drawer had not any effects in the hands of the acceptor. The bill, not having been paid when due, was protested; but notice of non-payment was not given to the drawer till four days afterwards. The plaintiff having threatened to sue the endorser and acceptor, the endorser paid part of the money due on the bill to plaintiff's attorney; afterwards on a representation being made to the plaintiff of the probability of the acceptor being able to pay at a future period, plaintiff agreed not to press him. It was holden, that it was not necessary to give the drawer notice of the dishonour, the drawer not having any effects in the hands of the acceptor, although the endorser had.

From the circumstance of part payment of a bill without any objection to the want of notice^r, a jury may be directed to presume that notice was regularly given.

Protest.—In addition to notice of dishonour, it is necessary for the holder, in the case of a foreign bill, to protest (56) it for non-payment; but where there has been a promise of payment, after bill became due, such promise supercedes the necessity of proving either notice of dishonour or protest^s.

^r *Horford v. Wilson*, 1 Tauntou's R. 12.

^s *Gibbon v. Coggon*, 2 Camp. N. P. C. 188.

(56) See the form of protest used in England. Chitty on Bills, p. 159.

It appears from a passage extracted from the case of *Tassel v. Lewis*, Lord Raym. 743. ante p. 320. that this protest ought to be made on the last day of grace (57). This strictness, however, is not observed in practice. The modern usage is for the notary to make a minute on the bill, consisting of his initial, the day, month, and year, when payment was refused, and charges for making the minute. This minute, which is called noting, is unknown in the law as distinguished from the protest. The notary having made his minute, draws up the protest at his leisure.

In Buller's *Nisi Prius*, p. 272. it is said, "That the use of noting is, that it should be done the very day of refusal, and the protest may be drawn any day after by the notary, and be dated of the day the noting was made."

The practice certainly is as here stated; but in *Chaters v. Bell*, 4 Esp. N. P. C. 48. a question was raised, whether the protest ought not to be drawn on the day on which the bill is dishonoured; and it was contended, that the mere noting the bill on that day, and drawing the protest on a subsequent day, was insufficient. Lord Kenyon was of opinion that it was sufficient; and a new trial having been granted, Lord Ellenborough agreed in opinion with Lord Kenyon. A case was then reserved for the opinion of the court, and after argument, the court, conceiving the question to be of great importance, directed it to be turned into a special verdict. But the sum in dispute being very small, and the parties unwilling to incur the expense of a special verdict, the recommendation of the court was not attended to, and the case was not mentioned again.

The protest must be stamped.

The protest for non-payment on inland bills of exchange is regulated by the statute 9 and 10 W. 3. c. 17.; for at common law a protest was not required on such bills; and the power of protesting given by this statute is attended with very few advantages; so that it is not very frequently exercised.

Having inserted this statute before, p. 308, as an introduction to the statute 3 and 4 Ann. c. 9. which gives the protest for non-acceptance on inland bills of a certain description, I must refer the reader to that part of the work.

(57) With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace. Per Buller J. in *Leftly v. Mills*, 4 T. R. 174.

It remains only to observe, that the holder of a check is not bound to give notice of its dishonour to the drawer, for the purpose of charging the person from whom he received it. It is sufficient, if he presents it with due diligence to the bankers on whom it is drawn, and gives due notice of its dishonour to those only, against whom he seeks his remedy.—If a banker in London receives a check, by the general post one day, and presents it for payment the next day, he will be considered as having used due diligence^d.

VII. *Of the Acts of the Holder, whereby the Parties to the Bill may be discharged.*

If the holder enter into a composition with the acceptor, he thereby discharges the endorser^a.

So if the endorsee receive part payment from the acceptor^b, and take from him a security for the remainder, with the exception of a nominal sum, the endorser is discharged (58).

So where the holder, after receiving part payment from the acceptor^c, agreed to take a new acceptance from him for the remainder, payable at a future date, and that in the mean time the holder should keep the original bill in his hands as a security; it was holden, that such agreement amounted to giving time and a new credit to the acceptor, and discharged the endorser, who was not a party to such agreement.

† Rickford v. Ridge, 2 Camp. N. P. C. 537. h English v. Darley, 2 Bos. and Pul. 61. See the opinion of Eldon C. J.

a Ex parte Smith, Co. B. L. 5th edit. p. 168, 169. 3 Bro. Ch. C. 1. S. C. c Gould v. Robson, 8 East, 576.

(58) Receipt of part of the money from an acceptor will not discharge the drawer, if timely notice be given that a bill is not duly paid. Bull. N. P. 271.

The receipt of part of the sum mentioned in the bill from the drawer, will operate as a discharge to the acceptor, only *pro tanto*. Bacon v. Searles, 1 H. Bl. 88. Notwithstanding the receipt of part from the endorser, the holder may recover the whole amount of the bill from the drawer. Johnson v. Kenyon, 2 Wils. 262. Walwyn v. St. Quintin, 1 Bos. and Pul. 652.

But a mere forbearance to sue the acceptor after protest for non-payment, and notice, or what is equivalent to notice, thereof to the drawer, will not discharge the drawer^d.

The cases *ex parte Smith*, and *English v. Darley*, seem to have proceeded on a principle of law resulting from the relation, in which the acceptor of a bill of exchange may be considered as standing with respect to the other parties. Although by his acceptance he only undertakes to pay the debt of another, viz. of the drawer, yet is he primarily liable, for it is incumbent on the holder of the bill to resort to him in the first instance. Under this view, although his engagement is really only a collateral engagement, yet he may be considered as the principal debtor, and the remaining parties as sureties only. Now, in the case of simple contracts, if a creditor give time to the principal debtor (59), the collateral sureties are discharged both in law and equity^e; because the creditor cannot call on the other parties without an injury to the person to whom he has given time.

But in the case of an accommodation bill, the drawer is to be considered as the principal, and the acceptor as surety only; and consequently the acceptor will be discharged by giving time to the drawer, without the concurrence of the acceptor^f.

The doctrine laid down in *ex parte Smith*, and *English v. Darley*, must be confined to those cases in which the agreement between the holder and acceptor is made without the consent of the other parties to the bill, for otherwise they will not be discharged. This appears from the case of *Clark and others, executors of Males v. Devlin*, C. B. E. 43 Geo. 3. 3 Bos. & Pul. 363. in which it was adjudged, that the drawer of a bill, who had assented to the holder's taking a security from the acceptor, was, notwithstanding such security, liable to an action at the suit of the holder.

The holder of a bill on its becoming due, allowed the acceptor to renew it without consulting the endorser; but the endorser afterwards meeting the acceptor told him, that it was the *best thing that could be done*; it was holden, that

^d 2d. Resolution in *Walwyn v. St. Quintin*. 1 Bos. and Pul. 652. fully stated ante p. 326.
^e Per Chambre J. 3 Bos. and Pul. 366.
See also *Rees v. Berrington*, 2 Ves.

Jun. 540. and *Nisbet v. Smith*, 2 Bro. Ch. C. 579.
^f *Larton v. Peat*, 2 Camp. N. P. C. 185.

(59) Without any reserve of the remedy against the sureties, per Lord Eldon Ch. *ex parte Gifford*, 6 Vesey, 807.

this was not a recognition of the terms granted by the holder to the acceptor, and that the endorser was discharged^l.

The holder may sue a *prior* endorser^h, although he has taken in execution a subsequent endorser, and afterwards let him go at large on a letter of licence without having paid the debt. In a case where an action was brought by several partners as endorsees of a promissory note against the defendant as endorser, and it appeared in evidence, that one of the partners had discharged a *prior* endorser, by a deed of composition; it was holden, that such deed operated as a release to the defendantⁱ (60). But where the endorsee of a note made by the defendant for the accommodation of the payee and endorser covenanted not to sue the payee and endorser, it was holden, that the defendant could not avail himself of this covenant, in an action brought against him by the endorsee, although the defendant, by the verdict against him in this action would have a right to recover over against the payee and endorser^k.

The holder sued the acceptor and charged him in execution^l; the latter obtained his discharge under the Lords' Act; the holder then sued the drawer, and recovered the amount of the bill; whereupon the drawer sued the acceptor, and charged him in execution; this was holden

g Withall v. Masterman & Co. 2 Camp. N. P. C. 179.

h Hayling v. Mulhall, 2 Bl. R. 1235.

i Ellison and others v. Dezell, Bristol, Sum. Ass. 1911. M. S.

k Mallet v. Thompson, 5 Esp. N. P. C. 178.

l Macdonald v. Bovington, 4 T. R. 825. cited in English v. Darley, 2 Bos. and Pul. 61.

(60) "If a holder enter into an agreement with a *prior* endorser in the morning, not to sue him for a certain period of time, and then oblige a *subsequent* endorser in the evening to pay the debt, the latter must immediately resort to the very person for payment to whom the holder has pledged his faith that he shall not be sued. In the case *Ex p. Smith*, Lord Thurlow, "after consulting with all the judges, was of opinion, that the holder of a bill by entering into a composition with the acceptor discharged the endorser, and accordingly ordered the proof against the estate of the latter to be expunged, proceeding on the ground of the acceptor's liability being varied by the act of the holder. We all remember the case where Mr. Richard Burke being surety for an annuity, the grantee gave time to the principal, and yet argued that Mr. Burke was not relieved thereby, though the principal was; but it was answered that the grantee could make no demand upon the surety, because he must, by so doing, enforce a payment from the principal contrary to the agreement." Per Lord Eldon, C. J. in *English v. Darley*, 2 Bos. & Pul. 62.

regular, for although the discharge of the acceptor, under the Lords' Act, was a satisfaction of the debt as to the holder, yet it would not operate as such between the drawer and acceptor.

VIII. *Of the Action on a Bill of Exchange—Evidence—Recovery of Interest.*

A BILL of exchange being a simple contract, the form of action, which is adopted for the recovery of the sum of money mentioned in the bill in case of non-acceptance or non-payment, is a special assumpsit; and, consequently, the rule laid down in the third section of the chapter on assumpsit, ante p. 97, applies here, viz. that the declaration must state the contract, (which in this case is the bill,) truly and correctly, that is, either in the terms in which it was made, or according to the legal effect and operation of those terms; for a variance in any material point between the contract alleged, and the contract proved, will be fatal. As where the declaration stated the bill to be drawn by John Crouch^m, and upon the production of the bill in evidence, it appeared to have been drawn by John Couch, it was holden, that the variance was fatal.

It will be sufficient, however, to state the instrument according to its legal effect and operation.

As where a bill of exchange was payable to a fictitious payee or order, and endorsed in the name of such fictitious payee by agreement between the drawer and acceptor, it was holden that an innocent endorsee, for a valuable consideration, might declare on such bill as payable to *bearer*, either against the drawerⁿ, or against the acceptor^o of the bill (61).

^m Whitwell v. Bennett, 3 Bos. and Pul. 559.

ⁿ Collis v. Emett, 1 H. Bl. 313.

^o Gibson v. Minet, 1 H. Bl. 569. D. P. 3 Feb. 1791. diss. Thurlow Ch. Eyre C. J. and Heath J.

(61) Where the endorsement by the payee is in blank, and there is a mesne endorsement between that endorsement and the endorsement to the holder, the holder may strike out the mesne endorsement, and the endorsement to himself, and state himself in the declaration as endorsee of the payee, and this rule holds although the mesne endorsement be a special endorsement, Smith v. Clarke, Peake's N. P. C. 225. and 1 Esp. N. P. C. 180. So if a bill be

If it is alleged in the declaration, that the defendant on such a day drew a bill of exchange, a variance between the day laid in the declaration, (although not under a viz.) and the date of the bill will be immaterial^p; but if it be alleged that defendant, on such a day, made his bill of exchange, *bearing date the same day and year aforesaid*, then a variance between the days will be fatal^q.

In an action upon a bill of exchange^r, it is not necessary to set forth the custom; for *lex mercatoria est lex terræ*, and although plaintiff sets it forth, and does not bring his case within it, yet if by the law of merchants he has right, the setting forth the custom shall be rejected as surplusage.

In an action by the payee of a bill of exchange against the acceptor, on a bill payable to the plaintiff or order, the declaration omitted to allege a delivery to the payee; it was holden on special demurrer, that the omission was immaterial, and that the allegation that the drawer made the bill was sufficient^s, for that included the delivery of the bill to the payee.

In a late case^t, where an action was brought against the acceptor of a bill *payable to the plaintiff's own order*, and the declaration alleged a delivery of the bill to the defendant, which he afterwards accepted. On special demurrer, because it was not alleged that the defendant ever re-delivered the bill to the plaintiff, the court were of opinion that there was not any ground for the objection; for the acceptance of the bill vested a right in the drawer to sue upon it; and if, after acceptance, the acceptor improperly detained the bill in his hands, the drawer might nevertheless sue him on it, and give him notice to produce the bill, or on his default give parol evidence of it.

In an action brought on a bill payable to the plaintiff's own order, it is not necessary for the plaintiff to allege in the declaration, that he has not made any order for the payment of the bill, nor that he has made any order for the

p Coxon v. Lyon, York Lent Ass. 1810. r Mogadara v. Holt, 1 Show. 317.
 Thomson B. 2 Camp. N. P. C. 307. u. s Churchill v. Garduer, 7 T. R. 596.
 q Anou. per Ellenborough C. J. 2 t Smith v. M'Clure, 5 East's R. 476.
 Camp. N. P. C. 308.

drawn payable to A. who endorses it to B., by whom it is endorsed to C., who afterwards endorses it to the holder; the holder may state in his declaration that the bill was endorsed by A. to C., who endorsed it to the holder, leaving out the intermediate endorsement to B. Chaters v. Bell, 4 Esp. N. P. C. 210.

payment of it to himself; for a bill payable to a person's own order is payable to himself, if he does not order it to be paid to any other; and such order not appearing, it will be presumed that none was made.

In an action by the endorsee against the drawer for non-payment of a bill, it is not necessary to state in the declaration, that the bill was accepted; if stated, however, it must be proved, but such proof will be supplied by evidence of a promise to pay the plaintiff after the bill became due; because such promise is an admission of the acceptance^a.

If a bill of exchange is accepted, *payable at a particular place*, in an action against the acceptor, this addition to the acceptance does not require to be noticed in the declaration, being no part of the contract, but merely a memorandum, where payment may be demanded^x; neither is it any ground of demurrer if it be not alleged, that the bill was presented for payment at such place^y. Proof of presentment for payment at the place mentioned is not necessary^z.

The form of a declaration on a bill of exchange varies according to the parties against whom the action is brought.

As the contract of the endorser to pay the bill is not absolute^a, but conditional, that is, in the event of a demand made on the acceptor *at the time of payment and his refusal*, it is incumbent on the holder to state in his declaration against the endorser, and to prove at the trial such demand and refusal, and that the endorser has had due notice thereof.

An action was brought by the payee against the drawer of an inland bill of exchange^b, drawn in Jamaica at a time when days of grace were not allowed in that island; and the declaration stated, that the bill was drawn on the 16th of December, 1800, payable four months after date, and that, after it had been accepted by the drawee, *the time limited for the payment of the bill* being expired, to wit, on the 20th day of April, 1801, at, &c. it was shewn to the acceptor for payment, who then and there refused to pay the same, of which default the defendant (the drawer)

^a Jones v. Morgan, 2 Camp. N. P. C. 474.

^x Lyon v. Sandius, 1 Camp. N. P. C. 423.

^y Fenton v. Goundry, B. R. E. T. 1811. 2 Camp. N. P. C. 656. and 13 East, 459; but in *Saunderson v. Bowen*, B. R. M. 52 G. 3. it was adjudged on demurrer, that in an action on a promissory note, whereby the

defendant promised to pay a sum of money on demand at a particular place, it ought to be averred, that the note was presented for payment at that place.

^z 2 Camp. N. P. C. 657.

^a *Rushton v. Aspinall*, Doug. 679.

^b *Lindo v. Burgos*, Privy Council, 29 June, 1805, per Grant, Master of the Rolls, MSS.

afterwards, to wit, on the *same day and year last aforesaid*, to wit, at, &c. had notice; on demurrer, the declaration was holden bad. In the preceding case it must be observed, that the payment was demanded, or at least stated in the declaration to have been demanded, after the proper time. In *Rushton v. Aspinall*, Doug. 679. on a bill payable three months after date, the payment was stated in the declaration to have been demanded before the proper time, viz. on the day when the bill was drawn, and it was considered as a nullity.

If the bill be endorsed by procuration from the payee, care should be taken how such endorsement is stated in the declaration^c; for in a case where it was stated in the declaration, that A. drew a bill payable to B., and that B. endorsed it, *his own hand-writing being thereunto subscribed*; but, when the bill was produced, it appeared to have been endorsed *by I. S., by procuration from B.*; the variance was holden to be fatal. But where the declaration stated^d that the payee endorsed the bill "*his own proper hand-writing being thereunto subscribed*," and it appeared that the endorsement was in the hand-writing of the payee's wife, but that the defendant, when acquainted with this circumstance, promised to pay the bill; Lord Ellenborough said, he thought it would be too narrow a construction of the words *own hand*, to require that the name should be written by the party himself, and he was inclined to think, it would be enough to shew the name written by an authorized agent; but that, at any rate, the defendant could not be allowed to take the objection, after a promise to pay, made with a knowledge of all the facts.—In *Heys v. Heseltine* and another^e, where it was averred that the defendants accepted the bill, and the acceptance was by an agent thus, "for Heseltine and Co. John Wilson;" Lord Ellenborough was of opinion, that the evidence supported the declaration; observing, that if the defendant accepted the bill by an agent, in contemplation of law, they accepted it themselves; and it was a general rule in pleading, that facts might be stated according to their legal effect.

In a case where the endorser's name had been put on the paper before the bill was drawn, and it was stated in the declaration that the endorsement was made *after* the drawing the bill, the variance was holden to be immaterial^f. So

^c *Levy v. Wilson*, 5 Esp. N. P. C. 150.
Ellenborough C. J.

^d *Helmsley v. Leader*, 2 Camp. N. P. C. 450.

^e 2 Camp. N. P. C. 604.

^f *Russell v. Langstaff*, Doug. 514.

where the endorsement was stated to have been made before the bill became due, and it appeared in evidence to have been made *after* the bill became due, this was holden not to be a material variance^g.

When the action is brought between the immediate parties to the bill, it is usual to subjoin such counts as will embrace the consideration for which the bill has been given; for as the bill does not merge the original demand, if the plaintiff fail in substantiating in evidence the special count, he may resort to evidence on the common counts (62).

Proceedings subsequent to the Declaration.—The plaintiff having declared, the defendant, if he has not any defence, either compromises the action by paying, or giving

^g Young v. Wright, 1 Camp. N. P. C. 139.

(62) In *Alves v. Hodgson*, 7 T. R. 241. where the plaintiff had declared specially on a written contract made in Jamaica, and on a quantum meruit, and was prevented from establishing the special count, because the contract, by the laws of the island of Jamaica, was void for the want of a stamp; it was holden, that he might recover on the quantum meruit. So where a promissory note had been given for money lent, which when produced in court was unstamped. Lord Kenyon C. J. permitted the plaintiff to recover on a common count for money lent, by proving that when the money, for which the note had been given, was demanded of the defendant, he acknowledged the debt. *Tyte v. Jones*, Midd. Sittings, 1788. 1 East's R. 58 n. (a.) *Wilson v. Kennedy*, 1 Esp. N. P. C. 245. S. P. In cases of this kind, if the defendant call for a particular of the plaintiff's demand, the causes of action in the general counts ought to be stated in the particular, otherwise the plaintiff will not be permitted to go into evidence on them. *Wade v. Beasley*, 4 Esp. N. P. C. 7. Kenyon C. J. If the plaintiff's particular conveys the requisite information to the defendant, however inaccurately it may be drawn up, it is sufficient, unless the defendant will undertake to swear that he has been misled by the inaccuracy. *Day v. Bowyer*, Sittings after H. T. 1806. Ellenborough C. J. 1 Campb. N. P. C. 69 n. And although the general rule is, that the plaintiff, who has delivered an imperfect particular, shall be restricted in his evidence, and not permitted to recover any thing ultra the contents of such particular, yet if the defendant, in attempting to defeat the restricted claim of the plaintiff, gives him a better case than he was at liberty to make for himself, he will be entitled to a verdict for all that is proved due to him: what he could not have insisted on as a right he may receive as a boon. *Harst v. Watkis*, M. T. 48 G. 3. B. R. Ellenborough C. J. 1 Camp. N. P. C. 68.

security for the debt and costs ; or he lets judgment go by default.

If the holder commences one action against the drawer^h, and another against the endorser, the court will stay all the proceedings upon payment of the amount of the bill and the costs of the two actions, without regarding the costs which may have been incurred in actions brought by the holder against any other parties to the bill. But when the application for staying proceedings comes from the acceptor, who is the original defaulter, the court will not regard it, except upon payment of the amount of the bill and costs in *all* the actionsⁱ.

When the defendant suffers judgment to go by default, the plaintiff must, before he is entitled to final judgment and execution, ascertain the amount of the debt. Formerly this was done by executing a writ of inquiry of damages; but of late years, in the courts of King's Bench^k and Common Pleas^l, in actions upon promissory notes and bills of exchange, where it appears on the face of the declaration that the actions are brought on the notes or bills^m, and the money mentioned therein is not foreign money, it is usual to apply to the court for a rule to shew cause why it should not be referred to the master in B. R. and prothonotary in C. B., to see what is due for principal and interest, and why final judgment should not be signed thereon, without executing a writ of inquiry, which rule is made absolute on an affidavit of service, unless good cause be shewn to the contrary. In vacation time, application may be made to one of the judges of B. R. or C. B. at chambers. N. The rule ought not to be applied for on the day of signing interlocutory judgment, but some day afterⁿ.

It is worthy of remark, that the Court of Exchequer still adheres to the ancient practice of executing a writ of inquiry of damages upon a judgment by default, in actions on bills of exchange and promissory notes.

Where the bill of exchange is for foreign money^o, *e. g.* for Irish money, the court will not permit the master to

^h Smith v. Woodcock, 4 T. R. 691. S. P. on a promissory note, Windham v. Wither, and Windham v. Trull, Str. 515.

ⁱ Admitted per Curiam, in Smith v. Woodcock, 4 T. R. 691.

^k Shepherd v. Charter, case on a bill of exchange, B. R. June 4th, 1791. 4 T. R. 275.

^l Rashleigh v. Salmon, case on a promissory note, C. B. June 15th, 1789. 1 H. Bl. 252.

^m Andrews v. Blake, case on a bill of exchange, C. B. Nov. 25, 1790. 1 H. Bl. 529.

ⁿ Gishorn v. Noad, 8 T. R. 648.

^o Gordon v. Corbett, B. R. H. 46 G. 3. Smith's R. 179.

^p Mannsell v. Lord Massareene, 5 T. R. 87.

ascertain the value. In this case, therefore, the plaintiff must have recourse to a writ of inquiry. Upon the execution of which it is now holden^p, notwithstanding former decisions to the contrary^q, that it is not in any case necessary to *prove* the bill of exchange, the bare production of it being sufficient; for by suffering judgment to go by default, the defendant admits the cause of action to the amount of the bill. The bill, however, must be produced to the jury, in order that they may see whether or not any part of it has been paid.

Evidence.

In an action by the endorsee of a bill against the acceptor^r, it is not necessary for the plaintiff to prove the hand-writing of the drawer, for when a bill is presented for acceptance, the acceptor is supposed to look at the hand-writing of the drawer, and on that account he is precluded from disputing it afterwards, and cannot give in evidence even a forgery of such hand-writing (63). But the hand-writing of the first endorser must be proved, because the acceptor is not supposed to look any further than the hand-writing of the drawer^s.

Action by the endorsee against the endorser of a bill of exchange^t. The declaration stated several endorsements

p Green v. Hearne, 3 T. R. 301.

q Snowdon v. Thomas, 3 Wils. 155.
2 Bl. R. 748. S. C.

r Jeny's v. Fowler, Str. 946. coram
Raymond C. J. London Sittings.
Per Buller J. 1 T. R. 655. S. P.

s Smith v. Chester, 1 T. R. 634. Cooper v. Lindo, B. R. London Sittings after M. T. 52 G. 3. S. P. as to hand-writing of 2nd endorser, being alleged in declaration.

t Critchlow v. Parry, B. R. 2 Camp. N. P. C. 182.

(63) A bill of exchange was shewn to the defendant, whose name appeared on the bill as acceptor, and he was asked whether it was his hand-writing, he said it was, and that the bill would be duly paid: Lord Ellenborough C. J. held that this accredited the bill, and the plaintiff having been thereby induced to take it, the defendant could not set up as a defence that his name, as written on the bill, was a forgery, Leach v. Buchanan, 4 Esp. N. P. C. 226. A forged bill was drawn upon the plaintiff, which he accepted and paid to an innocent endorsee, who had given a valuable consideration for the bill; on discovering the forgery, the plaintiff brought an action for money had and received, to recover back the money; it was holden, that the action would not lie; Lord Mansfield C. J. observing, that it was incumbent on the plaintiff to have been satisfied as to the drawer's hand-writing before he accepted the bill. Price v. Neal, 3 Burr. 1354. 1 Bl. R. 390. S. C.

prior to that of the defendant, which was immediately to the plaintiff. A question arose, whether upon proof of the defendant's hand-writing, it was necessary to prove the hand-writing of any of the prior endorsers, and particularly that of the original payee. The plaintiff's counsel contended, that the defendant's endorsement admitted all antecedent endorsements; that even if they were forged he would be liable; that he was to be considered as the drawer of a new bill of exchange, and that his contract was very different from that of the acceptor, who only undertook to pay to the payee or his order, and against whom, therefore, a title through the payee must be established. Lord Ellenborough was of this opinion, and the plaintiff had a verdict.

Action for money^a paid by plaintiffs, Messrs. Forsters, Lubbock, and Co. bankers for defendant. A bill of exchange was drawn on defendant, by one Hanley, payable to his own order, which defendant accepted, "payable at Forsters, Lubbock, and Co. London," the plaintiffs; when this bill was presented at the plaintiffs' house, it was paid by them, and the action was brought to recover the sum so paid. Plaintiffs proved the acceptance, and the fact of payment, and contended they were entitled to recover without proving the endorsement of the drawer, which was upon the bill at the time it was paid by them, alleging that the bill, when presented, being *prima facie* in a negotiable state, they were authorized to pay it, and were not bound to inquire into the title of the holder; but Lord Ellenborough ruled that it was necessary to prove the first endorsement.

In an action against the drawer of a bill^z, it was holden, that payment of money into court, upon the whole declaration, was such an admission of the cause of action as superseded the necessity of proving the hand-writing of the drawer.

Where notice of the dishonour of a bill has been given by letter^y, a copy of the letter cannot be given in evidence to prove such notice, unless there has been notice given to produce the original.

In an action against the drawer of a foreign bill^x, the protest being part of the custom of merchants with respect to

^a Forster v. Clements, B. R. London
Sittings after H. T. 1809. 2 Camp.
N. P. C. 17.

^x Gutteridge v. Smith, 2 H. Bl. 374.

^y Langdon v. Hells, 5 Esp. N. P. C.
156.

^z Gale v. Walsh, 5 T. R. 239.

foreign bills, must be proved (64), if the bill has been drawn for actual value in the hands of the drawee; but not otherwise^a. A promise by the drawer^b, after the bill is due, that he will pay it, supersedes the necessity of producing the protest; for in such case it will be presumed from the party's not objecting to the want of a protest at the time when he made the promise, that he has received due notice of dishonour by a protest regularly drawn up by a notary.

In an action by the holder against the drawer^c, the acceptor is a competent witness to prove that the drawer had not any effects in his hands, and thereby to relieve the holder from the necessity of proving notice of dishonour; for though by supporting the action against the drawer, he relieves himself from an action at the suit of the holder, he at the same time gives an action against himself at the suit of the drawer, in which the evidence he has given of the want of consideration will not avail him, for that fact must be proved by another witness.

In an action by the endorsee against the acceptor, the defendant may call the payee and endorser to prove that the bill was void in its creation, as being drawn in London without a stamp, though dated abroad^d.

So in an action by an endorsee of an accommodation bill, payable to the drawer's own order, against the acceptor, it was holden, that the drawer who had endorsed the bill to the plaintiff, might be a witness to prove that the bill was given by him to the plaintiff on an usurious consideration, the witness having been released by the acceptor^e; or, without a release, to prove that there was usury in the discount of the bill by the witness^f.

In an action by endorsee against drawer, the payee and

^a Legge v. Thorpe, 12 East, 171. 2

Camp. N. P. C. 310. S. C.

^b Gibbon v. Coggon, 2 Camp. N. P. C. 188.

^c Staples v. Okines, 1 Esp. N. P. C.

332. Peake's Evid. 154, 5. Per Ken-

yon C. J. See also Walwyn v. St. Quintin, 2 Esp. N. P. C. 515.

^d Jordaine v. Lashbrook, 7 T. R. 601.

^e Rich v. Topping, Peake's N. P. C. 224. 1 Esp. N. P. C. 177. S. C.

^f Brard v. Ackerman, 5 Esp. N. P. C. 119.

(64) If in a declaration on an inland bill of exchange, a protest and notice thereof be set forth, the plaintiff must prove them; inasmuch as protests on inland bills of exchange are material, entitling the holder to costs under stat. 9 & 10 W. 3. c. 17. and 3 & 4 Ann. c. 9. per Lord Kenyon C. J. in Boulager v. Talleyrand, 2 Esp. N. P. C. 550.

endorser was holden^g to be a competent witness to prove that the defendant had acknowledged his liability and promised to pay the bill.

In an action by the endorsee against the drawer of a bill of exchange, drawn without consideration, the payee who endorsed it to the plaintiff, in payment of goods, is a competent witness to prove the consideration for the endorsement^h. But in an action by the endorsee against the maker of a promissory note, without original consideration, if the payee has become bankrupt, and obtained his certificate subsequently to the date of the note, he is not a competent witness for the defendantⁱ.

Recovery of Interest.—On bills of exchange payable at a day certain, and not carrying interest on the face of them, interest is recoverable from the day on which the bill becomes due (65).

Formerly interest was computed from the day on which the principal became due, to the time of commencing the

- ^g *Stevens v. Lyuch*, 2 Camp. N. P. C. 332. ⁱ *Maudrell v. Kennett*, Lond. sittings in H. T. 1809. Cor. Bayley J. ib. n.
^h *Shuttleworth v. Stephens*, 1 Camp. N. P. C. 407.

(65) The general rule at the present day, with respect to the allowance of interest, is much narrower than it was formerly. The modern doctrine is, that interest ought to be allowed in those cases only, where there is a contract for payment of money on a certain day, as on bills of exchange and promissory notes; or where there has been an express promise to pay interest; or where, from the course of dealing between the parties, it may be inferred, that this was their intention; or where it can be proved, that interest has been actually made of the money*. In a contract for the sale of goods, although a particular time be limited for payment of the price, yet the vendor is not entitled to interest on the price from that time†. But where the goods are to be paid for by a bill, interest is recoverable from the time when the bill, if given, would have become due, even in an action for goods sold and delivered. *Marshall v. Poole*, 13 East, 98. *Porter v. Palsgrave*, 2 Camp. N. P. C. 472. And in such cases interest will be allowed, although the defendant has not accepted the goods, in an action for not accepting the goods. *Boyce v. Warburton*, 2 Camp. N. P. C. 480. Bankers cannot charge interest upon interest upon money advanced by them without an express contract for that purpose. *Dawes v. Pinner*, 2 Camp. N. P. C. 486.

* Per Ld. Ellenborough C. J. in *De Havillaad v. Bowerbank*, 1 Camp. N. P. C. 51.

† *Gordon v. Swan*, B. R. L. T. 50 G. 3. 2 Camp. N. P. C. 420. 12 East, 419.

action; but, according to *Robinson v. Bland*, 2 Burr. 1085, interest ought to be carried down to the day on which judgment is signed (66).

This period for the computation of interest was recognized by Buller J. in *Frith v. Leroux*, 2 T. R. 58. where that learned judge said, that on debts carrying interest, the jury are *now* directed to give interest in damages up to the day on which judgment may be signed.

Where the terms of a promissory note are, that it shall be payable by instalments^k, and on failure of payment of any instalment the whole is to become due, interest becomes payable from the time of the first default.

Under a particular of the plaintiff's demand^l, stating that the action was brought to recover the amount of a note, interest (although not claimed *eo nomine* in the particular,) is recoverable, as arising out of the principal demanded by the particular.

IX. Of the Nature of a promissory Note.—Stat. 3 and 4 Ann. c. 9. s. 1. placing promissory Notes on the footing of inland Bills of Exchange.—What are negotiable Notes within the Statute.—Of Bankers' Notes.—Joint and several Notes.—Consideration.—Stamp.

A PROMISSORY note is a promise in writing to pay to A, or order, or to A. or bearer, a sum of money, either at

^k *Blake v. Lawrence*, 4 Esp. N. P. C. 147. *Ellenborough C. J.*

^l S. C.

(66) It must be observed, that in *Blaney v. Hendrick*, C. B. E. 11 Geo. 3. 3 Wil. 205. 2 Bl. R. 761. S. C. where it was holden, that in assumpsit on an account stated between merchant and merchant, the jury on the execution of the writ of inquiry might give interest from the day the account was stated, the interest was carried down to the time of bringing the action according to *Wilson's Report*, and down to the time of the inquisition, according to *Blackstone's Report*.

sight, or at a certain time after sight, or after date, or on demand.

It having been holden, in the case of Clerk v. Martin, Salk. 129, and in other cases, that the *payee*, and in Buller v. Crips, 6 Mod. 29. that the endorsee of a promissory note, payable to order, could not maintain an action against the maker thereof, such note not being within the custom of merchants; it was, for the purpose of encouraging trade and commerce, by permitting promissory notes to be negotiated in like manner as inland bills of exchange, enacted by stat. 3 & 4 Ann. c. 9. s. 1. "That all notes (67) in writing, made and signed (68) by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, usually entrusted by them to sign such notes for them, whereby such person, &c. or their servant or agent, promise to pay to any other person or persons, body politic and corporate, or order, or bearer, the money mentioned in such note, shall be construed to be, by virtue thereof, due and payable to such person, &c. to whom the same is made payable; and also such note, payable to any person, &c. or order, shall be assignable or endorsible over in the same manner as inland bills of exchange are, or may be, by the custom of merchants; and the person, &c. to whom the money is *payable*, may maintain an action for the same in *such manner as he might upon any inland bill of exchange*, made according to the custom of merchants; and the person, &c. to whom such note is *endorsed* or assigned, may maintain an action, either against the person, &c. who or whose servant or agent signed such note, or against any of the persons who endorsed the same, *as in cases of inland bills of exchange*, and the plaintiff shall recover damages (69) and costs of suit; and in case of non-

(67) It has not been determined, whether this statute extends to foreign notes. In Pollard v. Herries, 3 Bos. & Pul. 335. an action was brought on a promissory note made at Paris, and payable there or in London. The plaintiff recovered, and no objection was raised on the ground of its being a foreign note.

(68) Declaration that defendant made a note, *et manu sua propria scripsit*. It was objected, that since this statute, plaintiff should have averred that defendant *signed* the note; but the court held it to be well enough, because laid to be written with his own hand. Taylor v. Dobbins, 1 Str. 399. 7 Geo. —. S. P. on demurrer. Elliott v. Cooper, Ld. Raym. 1376.

(69) From this word "damages," it has been inferred, that debt will not lie upon a promissory note, because damages are never re-

suit or verdict against plaintiff, defendant shall recover costs."

The foregoing statute being a remedial law, and made for the encouragement of trade and commerce, the courts have construed it liberally.

Hence a note, promising to *account with* J. S. or order, has been construed as a promise to *pay* J. S. or order, and within the meaning of the statute¹.

So a promissory note, payable to B.^m (omitting the words "or order,") three months after date, was holden a good note within the statute, and it was adjudged, that it might be declared on as such by the payee.

So where the promise was by A.ⁿ to pay so much to B., for a debt due from C. to B., it was holden, that it was within the statute, being an absolute promise, and every way as negotiable as if it had been generally for value received.

So where the note was in this form^o, "I do acknowledge that Sir A. C. has delivered to me all the bonds and notes, for which 400*l.* were paid to him on account of Col. S., and that Sir A. delivered me Major G.'s receipt, and bill on me for 10*l.*; which 10*l.* and 15*l.* 5*s.* balance due to Sir A. I am still indebted, and do promise to pay." On demurrer to the declaration, the note was adjudged good.

So where the note set forth in the declaration was^p, "I acknowledge myself to be indebted to A. in £ , *to be paid on demand for value received.*" On demurrer to the declaration the court, after solemn argument, held that this was a good note within the statute, the words "*to be paid*" amounting to a promise to pay; observing that the same words in a lease would amount to a covenant to pay rent.

This statute, however, extends to such notes only as contain an *absolute* promise to pay money at all events^q, (and

¹ *Morrice v. Lea*, 8 Mod. 362. 1 Str. 699. *Ld. Raym.* 1396, 7.

^m *Smith v. Kendal*, 6 T. R. 123. S. P. per Hardw. C. J. *Cunningham Bills of Ex.* 127. See also *Moor v. Pain*, Ca. Temp. Hardw. 288. where Hardwicke C. J. said this point had been ruled often.

ⁿ *Popplewell v. Wilson*, B. R. Str. 264. on error from C. B.

^o *Chadwick v. Allen*, Str. 706.

^p *Casborne v. Dutton*, Scacc. M. 1 Geo. 2. MSS.

^q Willes C. J. in delivering the opinion of the court in *Colehan v. Cooke*, H. 16 G. 2. C. B. Willes, 398.

covered in debt. See 1 Mod. Entr. 312. pl. 14. but in *Bishop v. Young*, 2 Bos. & Pul. 78. it was holden, that debt might be maintained by the payee against the maker of a promissory note, expressing a consideration on the face of it, as where it was expressed to be for value received.

not a promise depending on a contingency,) and where the money at the time of the giving the note becomes due and payable by virtue thereof, (so are the words of the statute) and not where it becomes due and payable by virtue of a subsequent contingency, which may perhaps never happen, in which case the money would never become payable (70).

On this ground the following notes have been adjudged not to be negotiable notes within the statute, viz.

A promise by defendant to pay to plaintiff 26*l.* within a month after Michaelmas, if the defendant did not pay the 26*l.* for which the plaintiff stood engaged for his brother I. B.

A promise to pay A. B. £ , value received, on the death of C. D. provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it.

A promise to pay money within so many days after the maker of the note should marry.

So where the promise was to pay A. F. £ out of the maker's money that should arise from his reversion of £ when sold; the declaration averred the sale of the reversion; yet it was holden, that the note could not be declared on as a negotiable note under the statute, because the money was to be paid only on a contingency.

A similar decision was made in *Hill v. Halford*², 2 Bos. & Pul. 413. where the promise was to pay £ , on the sale or produce, immediately when sold, of the White Hart, St. Alban's, Herts, and the goods therein, although it was averred in the declaration, that the house and goods were sold.

In a case where the instrument acknowledged to have borrowed and received £ in drafts payable to the defendants at a future day, which the defendants promised to

r *Appleby v. Biddle*, B. R. H. 3 G. 1. MS.
s *Roberts v. Peake*, 1 Burr. 323.
t *Beardesley v. Baldwin*, Str. 1151. 7 Mod. 417. oct. ed.

u *Carlos v. Fancourt*, 5 T. R. 499.
x *Hill v. Halford*, 2 Bos. & Pul. 413. (in the Exch. Ch.) on error from B. R.

(70) Before the statute of Ann, a promise to pay A. or his assigns a sum of money within a certain time after defendant should be lawfully married to E. S. was holden not to be a good note; because to pay money on such a contingency could not be called trading, and therefore not within the custom of merchants, *Pearson v. Garrett*, 4 Mod, 242.

pay with interest; it was holden that this was a special agreement, and not a promissory note; for the money was not to be paid at all, unless the drafts were honoured^y.

Upon an instrument in the common form of a joint and several promissory note signed by A. B. and C., there was an endorsement (written, as appeared in proof, before B. and C. had signed the note) stating that the note was taken as a security for all balances, not exceeding the sum specified in the note, which A. might owe to the payee; that the note should be in force for six months, and no money liable to be called for sooner in any case: an action having been brought by the payee against B., the first count stating the note as payable on request, and a second as payable six months after date; Lord Ellenborough C. J. held, that, although the instrument possibly might have been considered as a promissory note in the hands of a *bonâ fide* holder, who had received it as such, yet as between the immediate parties it could only be considered as an agreement, for as to them the endorsement must be incorporated with the body of the note; and consequently an action could not be maintained upon it without an agreement stamp^z.

2. A promissory note must be for the payment of money only.

Hence on error from C. B. it was holden^a, that a note *to deliver up horses and a wharf*, and pay money at a particular day, could not be declared on as a note within the statute.

And a similar determination was made^b, where the promise was to pay 300*l.* to A. or order, *in good East India bonds*.

So where the promise was to pay J. S. so much money^c, or *to render the body of J. N. to prison before such a day*, the note was holden bad; because the note was not necessarily and originally for the payment of money, but by matter *ex post facto* became a note for payment of money only, viz. the body not being surrendered to prison.

3. It must not be payable out of a particular fund, which may or may not be productive. Statement of the consideration, however, for which a note was made, will not vitiate it.

^y *Williamson v. Bennet*, 2 Camp. N. P. C. 417.

^z *Leeds v. Lancashire*, 2 Camp. N. P. C. 205.

^a *Martin v. Chantry*, Str. 1271.

^b *Moor v. Vanlute*, E. 1 G. 1. C. B. Bull. N. P. 272.

^c *Smith v. Boheme*, (reported as to the argument) in Gilb. R. 93. cited in argument in Lord Raym. 1362 & 1336.

On this principle^d, a promissory note to pay a sum of money three months after date, for value received, of the premises in Rosemary Lane, late in the possession of T. R. was holden a good note within the statute.

In the following cases the principle before laid down was recognized, but the notes were adjudged good.

A promissory note was given to an infant^e, payable when he should come of age, viz. on such a day in such a year; this was holden good; for per Denison J. here is no condition or uncertainty, but it is to be paid certainly and at all events, only the time of payment is postponed.

So where plaintiff declared in 1st count on a promissory note^f, dated 27th May, 1732, whereby defendant promised to pay to H. D. or order, 150 guineas, ten days after the death of his father John Cooke, for value received, which note, after the death of the father (which was laid to be the 2d April, 1741), was duly endorsed by D. to plaintiff; and in the 2d count, on a promissory note, dated 15th July 1732, whereby defendant promised to pay H. D. or order, six weeks after the death of his father, fifty guineas for value received, the like endorsement laid after the death of the father as before; after a general verdict for plaintiff on both notes, it was insisted for defendant, in arrest of judgment, that these notes were not within the statute 3 & 4 Ann. c. 9. After three arguments^g, Willes C. J. delivered the opinion of the court in favour of the plaintiff, on the ground that the notes did not depend on any contingency; that there was a certain promise to pay at the time of giving the notes, and the money by virtue thereof would become due and payable one time or other, though it was uncertain when that time would come; that there was not any weight in the objection that the maker might have died before his father, in which case the notes would have been of no value, because the same might be said of any note payable at a distant time, that the maker might die worth nothing before the note became payable. He added, that the court thought that the averment of the death of the father before the endorsement did not make any alteration; because they were of opinion, that if the notes were not within the statute *ab initio*, they could not be made so by any subsequent contingency.

^d Burchell v. Slocock, Ld. Raym. 1545.
cited by Kenyon C. J. 6 T. R. 124.

^e Goss v. Nelson, 1 Burr. 226.

^f Colehan v. Cooke, H. 16 G. 2, C. B.

Wilkes, 393. Affirmed on error in
B. R. M. 18 G. 2. Str. 1217.

^g See Str. 1217.

So where the note was to pay within a certain time after such a ship was paid off^h; it was holden good; because the ship would certainly be paid off one time or other (71).

^h *Andrews v. Franklin*, H. 3 Geo. 1. B. R.

(71) In Strange's report of this case, 1 Str. p. 24. the opinion of the court is thus given: "the paying off the ship is a thing of a public nature, and this is negotiable as a promissory note." I have stated the case as it was cited by Willes C. J. delivering the opinion of the court in *Colehan v. Cooke*, Willes, 399. See also Mr. Hume Campbell's argument in *Evans v. Underwood*, 1 Wils. 263. where, in citing this case, he states the opinion of the court to have been, that the note was within the statute and negotiable, *because the paying off the ship was morally certain*. The same point was decided by Hardwicke C. J. in *Lewis v. Orde*, Middx. Sittings, 8 Geo. 2. The note was in this form: "I promise to pay J. S. £11 at the payment of the ship Devonshire, for value received." Willes C. J. in *Colehan v. Cooke*, Willes, 399. says, this case was determined on the same reason as *Andrews v. Franklin*, viz, that *the ship would certainly be paid off one time or other*, which seems to be the true reason; but in the report of *Lewis v. Orde*, Dict. Trade & Com. 261. copied by Cunningham, p. 127. of *Law of Bills and Notes*, 2d ed. 1761. Lord Hardwicke is made to say, "That as to the contingency of the payment, the subsequent act of the payment of the ship makes it certain, and therefore, though not a lien *ab initio*, yet sufficiently so, and within the statute, by the fact happening after;" and in a MS. note in the possession of the editor, Lord Hardwicke is made to say, "as to the time, this note is certainly within the statute, if it had been made payable at any precise future day; and if it be uncertain at first, but referred to a subsequent fact to make it certain, when that fact happens (as in this case it was averred that the ship Devonshire was paid), it is as much reduced to a certainty as if the day had been mentioned at first. But if the promise is to pay out of any particular fund, it is not a personal lien, and therefore not within the statute." It may be observed, that this reason clashes with the opinion of the court in *Colehan v. Cooke*, Willes, 399. where it was said, that if the notes were not within the statute *ab initio*, they should not be made so by any subsequent contingency, and with the decision in *Carlos v. Fancourt*, 5 T. R. 482. and in *Hill v. Halford*, 2 Bos. & Pul. 413. in which cases the events on which the notes were to become payable were averred in the declarations to have taken place, and yet the notes were holden not to be good. See also *Kingston v. Long*, Bayley, 71. where it was holden by the court, that if an instrument was not a *bill of exchange when drawn*, it could never afterwards become one. To the foregoing cases of *Andrews v. Franklin*, and *Lewis v. Orde*, may be added that of

See further on this subject, *Hausoullier v. Hartsinck*, 7 T. R. 733.

Bankers' cash notes, or goldsmiths' notes¹, as they were formerly called, goldsmiths at that time being bankers, are promissory notes given by bankers, payable to order or bearer, on demand, and are stated as such in pleading. They are considered as cash, are transferrable by delivery, but may be endorsed, in which case they may be declared on as a bill of exchange against endorser. At present cash notes are seldom made, except by country bankers, their use having been superseded by the introduction of checks.

Joint and several Notes.—A note beginning "I promise to pay," and signed by two or more persons, is several as well as joint².

If a promissory note appears on the face of it to be the separate note of A. only, it cannot be declared on as the joint note of A. and B., although given to secure a debt for which A. and B. were jointly liable³.

In an action by A. against B. upon a promissory note⁴, it was stated in the declaration, that B. and another, jointly or severally, promised to pay it. It was holden, that the declaration was good; for or was synonymous to and. They both promised that they or one of them should pay; consequently both and each were liable *in solidum*.

¹ Chitty, p. 939. ed. 2d.

Camp. N. P. C. 308. *Emley v. Lyt.*

² *March v. Ward*, Peake's N. P. C. 130.

B. R. H. 52 G. 3. S. P.

³ *Siffkin v. Walker and another*, 2 m *Rees v. Abbott*, Cowp. 832.

*Evans v. Underwood*⁵, where the note was to pay A. or order £8 upon the receipt of his the said A.'s wages, due from his Majesty's ship the Suffolk, it being in full for his wages and prize-money, and short-allowance money for the said ship; the declaration stated an endorsement by A., and averred that the defendant received the said wages from the said ship. After verdict for plaintiff, on motion in arrest of judgment, the case of *Andrews v. Franklin* was mentioned, which Mr. Ford, for the defendant, said had never been determined. The court said, that they would look into the case, and see whether it had been determined. The reporter adds, that the court inclined to give judgment for the plaintiff, and after looking into the case, did so, *ut audiui*. In *Beardesley v. Baldwin*, E. 15 G. 2. B. R. MS. the court said, that as to *Andrews v. Franklin*, if it ever was determined, which they could not find, it must have been decided on the certainty observed in the return of ships, and which must be looked upon as an event in itself not contingent.

⁵ 1 Wils. 262.

If an action is brought on a joint note^a, and some of the persons making the note are not made defendants, advantage can be taken of the omission by plea in abatement only (72).

An action was brought against defendant only on a joint and several note made by defendant and one Stoddart^c. Plea non assumpsit. Defendant gave in evidence an agreement in writing entered into by plaintiff with the assignees of Stoddart, then a bankrupt, to receive from them 600*l.* in lieu of 883*l.* actually due from the bankrupt on this note (which was for 100*l.*) and on other transactions; and that defendant was only surety for Stoddart. Defendant obtained a verdict. On motion to set it aside, it was resisted on the part of the defendant, on the ground that the agreement put an end to the plaintiff's recovery on the note, that the principal could not be discharged without discharging the surety also. On the part of the plaintiff it was urged, that it was not the meaning of the agreement that defendant should be discharged. But per Lord Mansfield C. J. the plaintiff was party to the agreement, and we cannot receive parol evidence to explain it. Whatever might be the intention of the parties, the principal cannot be released without its operating for the benefit of the surety. Rule discharged.

Consideration.—It will be presumed, that the note has been given for a good and valuable consideration until the contrary appear. As between the immediate parties, want or illegality of consideration may be insisted on as a defence.

In an action by the payee against the maker of a promissory note for 10*l.*^p which had been given by the defendant as an apprentice fee with his son to the plaintiff, to whom the son was bound; it appeared at the trial, that in the indentures of apprenticeship no mention had been made of this premium having been given with the apprentice, nor was there any stamp thereon in proportion to the value, as required by stat. 8 Ann. c. 9. in default of which, by the 39th section of the stat. the indentures are declared to be void. The apprentice remained some part of his time with

^a Per Buller J. in *Rees v. Abbott*, 5 Cowp. 832. ^c *Garrett v. Jull*, B. R. M. 22 G. 3. MS.

^p *Jackson v. Warwick*, 7 T. R. 121.

(72) This is a general rule. See *Rice v. Shute*, 5 Burr. 2611. and other cases cited in note (64), ante, p. 110.

his master, and then absconded. It was objected on the part of the defendant, that the indentures being void, the consideration of the note had failed. To this it was answered, that the avoiding of the indentures could not collaterally affect this note; but that at all events it was sufficient, if there were any consideration to sustain it; and here the master had provided board and lodging for some time for the apprentice. But Lawrence J. was of opinion, that the consideration was entire, and that it had wholly failed. The Court of King's Bench concurred in opinion with the learned judge.

Where the action is brought not as between immediate parties, and the plaintiff is a *bonâ fide* holder for a valuable consideration, without notice, such illegal consideration only as makes the note void *ab initio*, viz. gaming^q and usury^r can be alleged in bar of the action.

In an action by the endorsee against the maker of a promissory note, the defence insisted on was, that the note had been given for hits against defendant in a lottery insurance: Kenyon C. J. was of opinion, that the plaintiff was entitled to recover, observing that the innocent endorsee of a gaming note, or note given on an usurious contract, could not recover, but that in no other case could the innocent endorsee be deprived of his remedy on the note; and that a contrary determination would shake paper credit to the foundation^s.

A person, who at the request of the holder of a note, has put his name upon it, and in consequence thereof has been obliged to pay the contents to a *bonâ fide* holder, may recover the money paid from any person whose name is on the note, although he knew that the note was originally given for an illegal consideration, viz. for premiums for the insurance of tickets in the lottery^t.

Stamp.—Every promissory note must be duly stamped, that is, with a stamp of the proper value and proper denomination.

A promissory note^u, given at the time when the 31 Geo. 3. c. 25. was the only statute regulating the stamp-duty on promissory notes, was holden not available in law, because

^q Stat. 9 Ann, c. 14. s. 1. ante, p. 288. and Bowyer v. Bampton, Str. 1155.

^r 12 Ann, st. 2. c. 16. s. 1. ante, p. 289. Lowe v. Waller, Doug. 735.

^s Winstanley v. Bowden, Middx. sittings after M. T. 41 G. 3. B. R. MSS.

^t Seddons v. Stratford, London sittings after T. T. 34 G. 3. Kenyon C. J. Peake's N. P. C. 215.

^u Chamberlain v. Porter, 1 Bos. & Pul. N. R. 30.

it was stamped with a receipt stamp, although it was of equal value with that required for a promissory note.

For the amount of the stamp duties on promissory notes, see ante, p. 279.

For the statutes^x regulating notes given for a less sum than five pounds, see Chitty on Bills, Appendix, sect. 8. ed. 2nd.

~~OF THE TIME WHEN A NOTE OUGHT TO BE PRESENTED FOR PAYMENT.~~

X. Of the Time when a Note ought to be presented for Payment.

PAYMENT must be demanded within a reasonable time after the note becomes due. Whether a note has been presented for payment within a reasonable time is a question of law, but dependent on facts, viz. the situation of the parties, their places of abode, and the facility of communication between them^a.

On promissory notes, payable at a certain time after date, or after sight, three days grace are allowed; consequently, payment of such notes ought not to be demanded until the last of the three days, unless it happen to be a Sunday, or a great holiday, in which case payment ought to be demanded on the next preceding day. The three days of grace are computed exclusively of the day on which the payment is by the terms of the note to be made. It has not been determined solemnly, whether days of grace are to be allowed on notes payable at sight^b. They are not allowed on notes payable on demand.

Where a note is made payable at a month or months after date, the computation must be (contrary to the general rule of law) by calendar and not by lunar months.

Where a note is in the hands of an endorsee, and he demands payment thereof from the maker, who refuses or omits to pay the same, notice of such refusal or default ought to be given by the endorsee himself^c to the prior endorser or endorsers (if more than one) within a reasonable time; otherwise the endorser will be discharged.

x 15 G. 3. c. 51. 17 G. 3. c. 30. 37 G. 3. c. 32.

a *Darbishire v. Parker*, 6 East, 3.

b See this question discussed in Chitty's Treatise on Bills, p. 195, ed. 2d.

c See *Tindal v. Brown*, 1 T. R. 167.

ought to be set forth accurately, that is, either in the terms in which it was made, or according to the legal effect and operation of those terms; for a variance in any material point, between the statement in the declaration and the note produced in evidence, will be fatal.

As where in an action on a promissory note^g, made by the firm of Austin, Strobell, and Shirtliff, who were declared against by the name of William A., Robert S., and William S., and it was proved that the firm consisted of William A., Daniel S., and William S., it was holden that the variance was fatal.

Where the maker of a promissory note makes a memorandum at the foot of it^h, that he will pay it at the house of A., as this does not form any part of the contract, it is not necessary to state it in the declaration; but if it forms a part of the body of the note, it must be stated, and it must be averred, that the note was presented for payment at that place, even in an action against the makerⁱ.

In cases where several notes have been made by the defendant, and which are due and payable, a count on each note ought to be inserted in the declaration.

To the special count or counts, such of the common counts ought to be added as may be adapted to the circumstances of the case.

Although on a count for money lent, or for money had and received, a promissory note may be given in evidence^k, as affording a presumption that so much money was lent, or had and received, and although the jury, in case such evidence be not rebutted, will conclude against the defendant, yet it is advisable to declare specially on the note; for otherwise, in the case of a judgment by default, the usual reference to the master in B. R. or prothonotary in C. B. cannot be made to compute principal, interest, and costs^l.

Where a note is payable to A. or order, and endorsed, the endorser is considered as a warrantor of the note; and, therefore, it is necessary, in an action brought against the endorser, to allege and prove a demand of the maker^m, and notice of default or refusal to pay within a reasonable time by the holder himselfⁿ.

^g Gordon v. Austin, 4 T. R. 611.

^h Saunderson v. Judge, 2 H. Bl. 509.

ⁱ Saunderson v. Bowes, B. R. M. 52 G. 3. adjudged on demurrer.

^k Str. 725.

^l Osborne v. Noad, 8 T. R. 648.

^m Adjudged in C. B. E. 4 G. 2. cited by Lee C. J. in 2 Str. 1087. recognised by Lord Mansfield C. J. in 2 Burr. 676.

ⁿ Tindal v. Brown, 1 T. R. 167.

To an action on a promissory note, any plea may be pleaded which the law permits to be pleaded to actions founded on contract, e. g. accord and satisfaction, coverture, infancy, payment, statute of limitations, set-off, tender; as to which, see ante, tit. Assumpsit, s. IV. p. 110.—147.

To an action of assumpsit by A., B., and C., against D., as one of the endorsers of a promissory note drawn by E., in favour of C., D., and (himself) E., then in partnership, and by them endorsed to A., B., and C.; defendant pleaded in bar, that C. one of the plaintiffs, was liable as an endorser, together with D. On special demurrer the plea was holden to be good; Lord Eldon C. J. observing, that the subject of this plea could not have been pleaded in abatement; because a plea in abatement ought to give a better writ, not to shew that the plaintiff can have no action at all. The effect, however, of a judgment for the defendant would be, that if a man made a note to himself and others carrying on business under a particular firm, and that partnership was dissolved, the promissory note could neither be put in suit as such, nor enforced as an equitable agreement, because on a promissory note stamp. Considering, therefore, the quantity of circulating paper in this country, standing under the same circumstances with the note in question, the consequence of such a decision might be highly injurious. However, the case of *Moffatt v. Van Millengen*^p was unanswerable.

Evidence.—In an action on a promissory note, to which the general issue is pleaded, the plaintiff must prove every material allegation in the declaration.

It is a general rule, that to prove the contract the original note must be produced in evidence. This rule is dispensed with in special cases only, as where it can be proved, that the note has been lost or destroyed by the defendant^q, or that it is in the hands of the defendant, and *that he has had notice to produce it*^r. In these cases a copy of the note, or parol evidence of its contents, may be received.

The remaining evidence necessary to support the action will vary according to the character in which the parties bring the action.

In an action by *payee* against the maker, the hand-writing of the maker must be proved by the subscribing witness,

^p *Mainwaring v. Newman*, 2 Bos. & Pul. 120.

^q 27 G. 3. B. R. 2 Bos. & Pul. 124.
n. (c.)

^r Lord Raym. 731.
2 Bos. & Pul. 39.

if any; if not, by some person who is competent to prove such hand-writing. In an action, by *first endorsee* against the maker, the same evidence as in the preceding case, together with proof of the endorsement to the plaintiff, will be necessary. In an action against an endorser, proof of the hand-writing of the maker, or of any endorser prior to the defendant (except the first,) unless specially alleged in the declaration, is not necessary; but in this case it must be proved that payment was duly demanded of the maker, and that the maker refused to pay, or made default therein, and that notice of such refusal or default was given to the defendant within a reasonable time.

In an action against the *maker* of a note, although the promise be to pay the money at a particular place, it is not necessary to prove a presentment at that place^a.

A. being in insolvent circumstances^c, B. undertook to be a security for a debt owing from A. to C. by endorsing a promissory note made by A. payable to B. at the house of D. The note was accordingly so made and endorsed, with the knowledge of all parties. Just before it became due, B. having been informed that D. had no effects of A. in his hands, desired D. to send the note to him, B., and said he would pay it, B. having then a fund in his hands for that purpose; the note was not presented at D.'s house till three days after it was due. It was holden, that C. could not maintain an action against B. on the note, not having used due diligence in presenting the note as soon as it was due to D. for payment, and in giving immediate notice to B. of the non-payment by D.; for B. had a right to insist on the strict rule of law respecting the endorser of a note, notwithstanding the particular circumstances of the case.

In an action by a second, third, or any subsequent endorsee, against the maker, where the first endorsement is in blank; as the plaintiff is not bound to set forth any endorsement, except the first, but may strike out the others, if he adopts this course, the proof will be the same as in the preceding case; but if all or any of the endorsements subsequent to the first are set forth, they must be proved.

An endorser on a note^d, who has received money from the payee to take it up, is a competent witness for the maker in an action against him by the endorsee, to prove that he had

^a *Nicholls v. Bowes*, 2 Camp. N. P. C. 498. But see *Saunderson v. Bowes*, ante, p. 354.

^c *Nicholson v. Genthit*, 2 H. Bl. 609.

^d *Birt v. Kershaw*, 2 East, 458. recognised by Sir W. Grant, M. R. in *Paul v. —*, administrator of Hamilton, Privy Council, 29 June, 1805.

satisfied the note, being either liable to the plaintiff on the note, if the action is defeated, or to the defendant for money had and received, if the action succeeds; and his being also liable, in the latter case, to compensate the defendant for the costs incurred in the action, by such non-payment, makes no difference.

In an action by the endorsee against the maker of a promissory note^x without original consideration, if the payee has become bankrupt, and obtained his certificate subsequently to the date of the note, he is not a competent witness for the defendant, for he is no longer liable to the plaintiff; but would be liable to the defendant, if the latter were obliged by this action to pay the promissory note drawn for his accommodation.

Conclusion.—The limits prescribed to this abridgment will not permit the insertion of any more cases under this head, nor indeed is it necessary; for although a promissory note^y, while it continues in its original shape, does not bear any resemblance to a bill of exchange, yet when it is endorsed, the resemblance begins; for then it is an order by the endorser upon the maker of the note to pay to the endorsee; the endorser is as it were the drawer, the maker of the note the acceptor, and the endorsee the payee.

From this resemblance between a bill of exchange and promissory note, it follows that many of the rules which are applicable to bills of exchange, hold also in the case of promissory notes.

^x *Maundrell v. Kennett*, London sittings, H. T. 49 G. 3. *Bayley J.* 1 *Camp. N. P. C.* 408 n.

^y Per Lord Mansfield C. J. *Heylin v. Adamson*, 2 Burr. 676.

CHAP. X.

CARRIERS.

- I. *Of common Carriers and their Responsibility.*
- II. *Of Notices given by common Carriers for the Purpose of limiting their Responsibility, and the Manner in which such Notices have been construed.*
- III. *Of the Lien of Carriers.*
- IV. *By whom Actions against common Carriers ought to be brought.*
- V. *Of the Declaration.*
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I. *Of common Carriers and their Responsibility.*

MASTERS^a and owners of ships, hoymen, lightermen; barge owners^b, proprietors of waggons, stage coaches (1),

^a *Morse v. Slac*, 2 Lev. 69.

^b *Rich v. Kneeland*, Cro. Jac. 330.
Hob. 17. S. C.

(1) It was ruled by Holt C. J. in *Upshare v. Aidee*, B. R. London Sittings, H. 8 W. 3. Comy. 25. that a *hackney* coachman was not a common carrier within the custom of the realm, and could not be charged for the loss of a passenger's goods, except where there was an express agreement, and money paid for the carriage of the goods. And in *Middleton v. Fowler*, Salk. 282. there was a like determination by Holt C. J. at N. P. in regard to stage coachmen, except such as took a distinct price for carriage of goods, as well as persons. But in a late case of *Clarke v. Gray*, 4 Esp. N. P. C. 177. where an action was brought against the proprietor of a stage coach, to recover the value of a trunk which had been lost while the plaintiff was travelling in the defendant's coach,

&c. are denominated common carriers; and by the custom of the realm^c, that is, by the common law, are bound (2) to receive and carry the goods of the subject for a reasonable hire or reward (3), to take due care of them in their passage, to deliver them^d safely (4), and in the same condition as

c 1 Roll. Abr. 2. (C) pl. 1.

d Per Popham C. J. Owen, 57.

the defendant proved that he had given notice, that he would not be liable for any parcel of above £5 value, unless paid for as such; it was however contended for plaintiff, that this notice applied to the case of goods sent to be carried only, and not to the case of passengers' luggage. But *Lord Ellenborough C. J.* said, that it had been decided, that the luggage of passengers came within the exception. So per *Chambre J.* 2 Bos. & Pul. 419. "It has been determined, that if a man travel in a stage coach, and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost." If a coachman commonly carry goods, and takes money for so doing, he will be in the same case with a common carrier, and is a carrier for that purpose, whether the goods are a passenger's or a stranger's. Nisi Prius opinion of *Jones J.* in *Lovett v. Hobbs*, 2 Show. 127.

(2) An action on the case will lie against a common carrier for refusing to carry goods after an offer of his hire. *Jackson v. Rogers*, 2 Show. 327.

(3) In an action against a common carrier for losing a box by negligence, a motion was made in arrest of judgment, because a particular sum was not mentioned in the declaration to be paid for hire, but a reasonable reward only; the declaration was holden to be well enough, for, perhaps, there was not any agreement for a sum certain; yet as in such case the carrier may maintain a *quantum meruit*, he is equally liable as where there is an express agreement for a particular sum. *Bastard v. Bastard*, 2 Show. 81. Agreed also in *Lovett v. Hobbs*, 2 Show. 129.

(4) In *Golden v. Manning* and another, 2 Bl. Rep. 916. where an action was brought against carriers for not delivering goods within a reasonable time, the question was agitated, whether it was the duty of carriers to deliver as well as carry goods. The court declined giving any opinion on the general question, conceiving that under the special circumstances of the case then before them, the defendants were liable, because it appeared that their general course of trade was to deliver goods at the houses to which they were directed, that they received a premium and kept a servant for that special purpose, and that they must be understood to have contracted to carry the goods in question, on the same terms, and in the same manner, that they carried the goods of other persons. *Gould J.* expressed an opinion, that all carriers were bound to

when they were received, or in default thereof to make compensation to the owner for any loss or damage which happens while the goods are in their custody, except such loss or damage as arises from the act of God (5), as storms, tempests, and the like; or of the enemies of the king.

In an action brought against a common carrier by water, charging the defendant with negligence, it was holden to be no defence, "that the ship was tight, when the goods were placed on board, but that a rat, by gnawing out the oakum, had made a small hole through which the water gushed;" on the ground that whatever was not excused by law, was to be deemed a negligence in the carrier, and that he was answerable in all events, except where the goods were damaged by the act of God, or the king's enemies.

So where the proprietors of the Trent navigation^f had undertaken to carry goods from Hull to Gainsborough, and the vessel, on board which the goods were placed, drove against an anchor in the river Humber, and sank; it was holden, that the carriers were responsible to the owner of the goods for the damage sustained; although it was proved,

^e Dale v. Hall, 1 Wils. 281.

^f Proprietors of the Trent Navigation

v. Wood, E. 25 G. 3. B. R. 3 Esp. N. P. C. 127.

give notice of the arrival of goods to the persons to whom they were consigned, whether bound to deliver or not. In *Hyde v. the Trent and Mersey Navigation Company*, 5 T. R. 396. the general question, whether a carrier was bound to deliver the goods to the person to whom they are directed was again agitated; Ashhurst, Buller, and Grose, Js., were of opinion that a carrier was so bound; but Kenyon C. J. appears to have inclined to the contrary opinion. The special circumstances of the case (which see post p. 361.) rendered it unnecessary for the court to decide the general question.

(5) The plaintiff put goods on board the hoy of the defendant, who was a common carrier; coming through bridge, *by a sudden gust of wind* the hoy sunk and the goods were spoiled. Pratt C. J. held the defendant not answerable; the damage having been occasioned by the act of God. For, though the defendant ought not to have ventured to shoot the bridge, if the general bent of the weather had been tempestuous, yet this being only a sudden gust of wind had entirely varied the case. The plaintiff's counsel having offered some evidence, that if the hoy had been in a better condition it would not have sunk, the Chief Justice said that a carrier was not obliged to have a new carriage for every journey; it was sufficient, if he provided one which, without any extraordinary accident, (such as this was) would probably perform the journey. *Amies v. Stephens*, Str. 128,

that the accident was occasioned by the negligence of the persons on board a barge in the river, who had not put a buoy out, to mark the place where the anchor lay: the court observing, that there was a degree of negligence in the master of the vessel also; for his not seeing the buoy ought to have put him upon inquiring more minutely about the anchor; and even if there had not been any actual negligence, yet negligence in law was sufficient.

A common carrier being an insurer in all cases (except the two before mentioned) is responsible for a loss occasioned by accidental fire, provided such loss happens while the goods are remaining in his custody (6) *as a common carrier*.

As where the goods intrusted to a common carrier were consumed by an accidental fire^g, communicating to a booth where the goods had been deposited by the carrier in the course of the journey, it was holden, that the carrier was liable, although the jury found that the goods were consumed without any actual negligence on the part of the carrier.

So where common carriers from A. to B.^h charged and received for cartage of goods from a warehouse at B. (where they usually unloaded, but which did not belong to them)

^g *Forward v. Pittard*, 1 T. R. 27.

^h *Hyde v. Trent and Mersey Navigation*, 5 T. R. 389.

(6) In an action by the East India Company against a lighterman, on an undertaking to carry for hire on the river Thames, from the ship to the Company's warehouses, it appeared, that it was the usage of the Company, on the unshipping their goods, to put an officer, called a guardian, in the lighter, who, as soon as the lading is taken in, puts the company's lock on the hatches, and goes with the goods to see them safely delivered at the warehouse. This had been done in the present case, and part of the goods were lost. Raymond C. J. was of opinion, that this differed from the common case, this not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the Company's servant, who had hired the lighter to use himself; he thought, therefore, that the action was not maintainable, and the plaintiffs were non-suited. *East India Company v. Pullen*, Str. 690. It was observed by Chambre J. in 2 Bos. & Pul. 419. that the foregoing decision proceeded on the usage of the East India Company, who never intrust the lightermen with their goods, but give the whole charge of the property to the officer, called the guardian.

to the house of the consignee in B., it was holden, they were responsible for a loss by an accidental fire while the goods were in that warehouse; although they allowed the profits of the cartage to another person, and that circumstance was known to the consignee.

But where the goods are not remaining in the defendant's custody as common carrier¹, he is not liable; as where the goods had been carried by the defendant from A. to B. and there deposited in his warehouse, merely for the convenience of the owner, until they could be forwarded by another conveyance, (the owner not paying the defendant any thing for the warehouse room) and were consumed by an accidental fire there, it was holden, that the defendant was not liable.

If a common carrier be robbed of the goods², he shall answer the value of them: for *having his hire*, there is an implied undertaking for the safe custody and delivery.

Where a person undertakes to carry goods safely and securely¹, he will be responsible for the damage they sustain in the carriage through his neglect, though he is not a common carrier, nor has any reward for his labour (7); and this

¹ *Garride v. Trent and Mersey Navigation*, 4 T. R. 581.

² 1 Inst. 89. a. *Woodleife v. Curties*, 1 Rol. Abr. 2. (C) pl. 4. S. P.

¹ *Coggs v. Bernard*, Lord Raym. 909.

(7) In a special action on the case, wherein the plaintiff declared that, whereas the defendant had undertaken to carry a hare for the plaintiff from A. to B., yet the defendant carried the same so negligently, that he lost it by the way, to the damage of the plaintiff of £10. On demurrer to the declaration, it was objected by Hawkins Serjeant, that the plaintiff had not declared on the general custom of the realm relating to carriers, and, therefore, the defendant must be taken to be a private person; if so, there was not any consideration laid, and consequently the promise was merely *nudum pactum*. 2dly. The plaintiff had not set forth a delivery of the hare, upon which the promise was made, and for the breach of which promise the action was brought. Probyn and Reynolds (the only judges in court) as to the first objection admitted, that the defendant must be taken to be a private person; but it was determined in *Coggs v. Bernard*, that a private person was answerable, if he undertook the carriage of goods, for a misfeasance, though there was not any consideration; and the only difference was, that a common carrier was obliged to undertake the carriage of goods and a private person was not; but if a private person voluntarily undertook it, he was by law answerable for damage arising from his negligence. As to the second objection, the court said, that the delivery was implied; for it was stated, that the defendant had

rule holds, although the plaintiff, for greater caution, sends his servant with the goods, who pays a person for guarding them, because he apprehends danger of their being stolen^a.

Coach owners are not liable for injuries which passengers may sustain from inevitable accidents, as from the over-setting of the coach from the horses taking fright, there not being any negligence in the driver^a; but otherwise it is, if there be negligence in the driver.

The proprietors of a mail coach are answerable for an injury sustained by a passenger, through the misconduct of their driver. *White v. Boulton*, Peake's N. P. C. 81.

A., a stable keeper, let to B. four horses to draw B.'s carriage from C. to D. The horses were rode by A.'s servants. Through their negligence, the carriage of I. S. sustained an injury. It was holden, that I. S. might maintain an action against A. *Sammell v. Wright*, 5 Esp. N. P. C. 268.

II. *Of Notices given by common Carriers for the Purpose of limiting their Responsibility, and the Manner in which such Notices have been construed.*

THE general responsibility of common carriers under all circumstances, except those before mentioned, has induced them to make special contracts for the carriage of goods beyond a certain value, and to require a premium in proportion to the risk. In this case, if the premium is not paid, the carrier will not be answerable (8). That the public

m Robinson v. Dunmore, 2 Bos. & Pul. 416. *n Aston v. Heaven*, 2 Esp. N. P. C. 533.

carried the hare part of the way, which he could not have done without a delivery; and as for the breach of promise, the action was not brought for that, but for the loss of the hare; the promise was only inducement. Accordingly they gave judgment for the plaintiff. *Hutton v. Osborne*, B. R. M. 3 G. 2. MSS.

(8) A bag sealed was delivered to a carrier, and said to contain £200, and the carrier gave a receipt for so much, when in fact it contained £400: the carrier was robbed; it was ruled by Holt C.

may be informed of the nature of these special undertakings, it is usual for carriers, either to insert in the newspapers, or to distribute hand bills, or to place in a conspicuous situation in the office, or other place appointed for the reception of the goods, an advertisement in the form following: "Take notice, that the proprietors of coaches, &c. transacting business at this office, will not be accountable for any passengers' luggage, money, plate, jewels, watches, writings, goods, or any package whatever, (if lost or damaged,) above the value of 5*l.* unless insured and paid for at the time of delivery." (9)

The validity of these general notices was questioned in a modern case^o, and it was insisted, that they were contrary to the policy of the common law, and that it was the duty of the carriers, if the reward was not adequate to the risk, to make special acceptances of the goods in *such* case, at a rate proportioned to the value of the goods. But by Lord Ellenborough C. J. (who delivered the judgment of the court) "considering the length of time during which, and the extent and universality in which the practice of making such special acceptances of goods for carriage by land and water has now prevailed in this kingdom, under the observation and with the allowance of courts of justice, and with the sanction also and countenance of the legislature itself, which is known to have rejected a bill brought in for the purpose of narrowing the carrier's responsibility in

^o *Nicholson v. Willan*, 5 East's R. 507. See also *Lyon v. Mills*, 5 East's R. 493. where the same point was made, but the court did not give any opinion upon it.

J. that he should be answerable only for £200, for his reward extended no further. *Tyly v. Morrice*, Carth. 485. If a box is delivered to a carrier generally, and he accepts it so, he is answerable, though the party did not inform him that there was money in it; but if the carrier asks, and the owner says, there is not any money, or if the carrier accepts it conditionally, provided there is not any money in it, it was holden by King C. J. that the carrier was not liable in either of these cases. *C. B. Titchburn v. White*, London Sitings, Str. 145. See post p. 367. n. (11).

(9) The terms of these notices vary. The provisions of some are of such a nature as go in discharge of the liability of the carrier entirely, unless the terms of the notice are complied with (see a notice of this kind in *Clay v. Willan*, 1 H. Bl. 293.); others limit the responsibility of the carrier to a certain sum, if the conditions are not complied with. (See this kind of notice in *Clarke v. Gray*, 6 East's R. 564.)

certain cases, on the ground of such a measure having been unnecessary, in as much as the carriers were deemed fully competent to limit their own responsibility; considering also, that there is no case in the books, in which the right of a carrier; thus to limit by special contract his own responsibility, has ever been by express decision denied; we cannot do otherwise, than sustain such right in the present instance, however liable to abuse, and productive of inconvenience it may be; leaving to the legislature (if it shall think fit) to apply such remedy hereafter, as the evil may require."

The following cases will illustrate the manner in which these notices have been construed.

The defendants, who were proprietors of a coach^p, gave notice, "that cash, plate, jewels, writings, or any such kind of valuable articles, would not be accounted for if lost, of more than 5*l.* value, unless entered as such, and a penny insurance paid for each pound value." The plaintiff sent a parcel, consisting of light guineas, to go by the defendants' coach; but the person, who was employed by the plaintiff, to deliver the parcel, although acquainted with the terms on which the defendants carried valuables, paid two shillings only for the parcel, and two-pence for the booking. On the part of the plaintiff, it was insisted, that he was entitled to recover as far as 5*l.* by the terms of the notice: but the court were of opinion, that the fair construction of the notice was, that the defendants were not liable to any extent (10).

So where the defendants had given notice^q, that they would not be accountable for any parcels, &c. of more value than 5*l.* unless entered as such, and paid for accordingly; it was holden, that the owner of a parcel above the value of 5*l.* (which had been delivered to the defendants, and lost, but which had not been entered and paid for according to the value) was not entitled to recover *any thing*.

A parcel above the value of 5*l.*^r, was delivered to the defendants (who were proprietors of the mail, and of a heavy coach travelling the same road) and accepted by them to be conveyed by the mail. Notwithstanding this acceptance

^p Clay v. Willan, 1 H. Bl. 298.
^q Izett v. Mountain, 4 East's R. 371.

^r Nicholson v. Willan, 5 East's R. 507.

(10) Pigott v. Dunn, B. R. E. 36 G. 3. S. P. cited by Lawrence J. in Yate v. Willan, 2 East's R. 134.

the parcel was booked to go by the heavy coach. The parcel was lost, but it did not appear in what manner. At the trial it was proved that the owner had notice of an advertisement placed in the coach-office, in terms the same as that which is set forth in p. 364. of this work. The parcel in question had not been booked and paid for according to the terms of the notice. On the part of the owner of the parcel it was insisted, that the loss had not been incurred in the course of the defendants' employment as carriers, but had been occasioned by an act of tortious conversion in direct contravention of the terms on which the goods were delivered to and accepted by the defendants. But it was holden, that the evidence on which this argument was founded, viz. the mere fact of the booking of the goods for a different coach, and a subsequent non-delivery, amounted only to a negligent discharge of duty in their character as carriers, and not to an entire renunciation of that character, and of the duties attached to it, so as to make them guilty of a distinct tortious misfeasance in respect of the goods; and as the goods in question were above the value of 5*l.*, and had not been insured and paid for at the time of the delivery, the defendants were not accountable for the same, and consequently the plaintiffs were not entitled to recover any thing.

An action was brought against the proprietors of a stage coach^a for not safely carrying 100*l.* delivered to their book-keeper in a bag, from B. to L., and on the trial it appeared, that the money was put into a bag and carried by the plaintiff's servant to the defendants' house, and there delivered to their book-keeper, who did not ask any questions as to the contents of the bag, but took it as a common parcel, and was paid for as such by the servant, who did not give him any information about it; the money was lost; and the servant on his cross-examination swore, that he did not receive any particular instructions about the carriage, but only to deliver the parcel to the book-keeper, and pay what was demanded of him for the carriage: the defendants proved, that an advertisement had been put into the country newspaper, once every month for two years together, concerning the carriage of parcels by this stage coach, with a N. B. at the bottom of it, that the proprietors would not be answerable for any money, plate, jewels, writings, or other valuable goods, unless they were entered as such, and paid for accordingly; and that this paper was taken in at the house

^a Gibbon v. Paynton and another, B. R. E. 9 G. 3. Bull. N. P. 71. and 4 Burr. 2998.

where the plaintiff lodged, who was frequently seen with it in his hand, and appeared to be reading it. The jury found a verdict for plaintiff. On motion for new trial, the court of King's Bench held, that the defendants were not liable to answer for this money; for a carrier is only liable in respect of the reward which he receives: and in the present case there was a clear fraud (11) committed by the plaintiff. And per Yates J. here is a full proof of special acceptance, and a deceit on the part of the plaintiff; for it is not necessary that there should be a personal communication (12), in order to make a special acceptance. The

(11) The plaintiff delivered to the defendant*, a carrier, a box, telling him only, that there was a book and tobacco in the box, whereas, in fact, it contained 100*l*. Roll C. J. was of opinion, that, as the carrier had not made a special acceptance, he was answerable; but in respect of the intended cheat to the carrier, he told the jury they might consider him in damages; but the jury gave a verdict for 97*l*. against the carrier, which (as the reporter adds) *durum videbatur circumstantibus*. Lord Mansfield C. J. cited this case in *Gibbon v. Paynton*, 4 Burr. 280*l*. observing, that he should have agreed in opinion with the *circumstantibus*.

A box, in which there was a large sum of money was brought to a carrier, who demanded of the owner what was in it; he answered, that it was filled with silk, and such like goods of mean value; upon which the carrier took it, and was robbed†. And resolved, that he was liable; but if the carrier had told the owner, that it was a dangerous time, and if there were money in it, he durst not take charge of it, and the owner had answered as before, this matter would have excused the carrier.

Lord Mansfield C. J. in *Gibbon v. Paynton*, 4 Burr. 230*l*. commenting on the preceding case and the observations annexed to it, said, that he should have thought the carrier excused, although he had not expressly proposed a caution against being answerable for money; for it was artfully concealed from him that there was any money in the box. See ante, note (8) of this chapter.

(12) It is incumbent on common carriers to limit their responsibility by a notice given by themselves, that is, by advertisement in a newspaper, hand-bills, or a board placed in a conspicuous situation in the office appointed for the reception of the goods, with a proper notice painted or written on it, in large characters‡. Where the carrier circulates hand-bills he will be bound by their contents, and he cannot avail himself of the notice in the office, the terms of

* *Kenrig v. Eggleston*, Aley, 93.

† Case cited by Hale, in *Morse v. Slue*, 1 Vent. 238.

‡ See *Butler v. Heane*, 2 Camp. N. P. C. 415.

reason of a personal communication is, that each party may know the other's mind, and, therefore, if they know each other's mind in any other manner, that is sufficient.

In every contract for the carriage of goods^t, between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board, or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, *implied by law*, that his vessel is tight and fit for the purpose of employment, for which he offers and holds it forth to the public^u. And the carrier or lighterman will be responsible for a breach of this implied undertaking, although he should give notice, "that he will not be answerable for *any* loss or damage, unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he will pay 10*l.* per cent. on such loss or damage, so as the whole does not exceed the value of the vessel and freight;" because the object of such notice is to limit the responsibility of the carrier in those cases only, where *the law* would otherwise have made carriers answerable for the neglect of *others*, and for *accidents* which it might not be within the scope of ordinary care and caution to provide against. In *Ellis v. Turner*, 8 T. R. 531. where a similar notice was given, the owner of the vessel was holden liable for the whole loss upon the special undertaking of the master.

By stat. 7 G. 2. c. 15. s. 1. reciting, that it had been holden, that the owners of vessels were answerable for goods made away with by the masters or mariners, without the knowledge or privity of the owners, whereby merchants were

^t *Lyon v. Mills*, 5 East's R. 428.

^u *Ib.*

which vary from the hand-bills, and are more advantageous to himself.* Having taken this precaution, it will be left to the jury to presume that the owners of the goods have had notice of the advertisement, and consequently a personal communication of the terms of the notice in each particular case may be dispensed with. Where the notice is put on a board inlaid in the wall, an examined copy will be sufficient evidence†. In cases where the carrier has not given a general notice in the manner above mentioned, he will not be permitted to avail himself of the general usage as it prevails among other carriers. See Lord Ellenborough's opinion on this subject in *Clark v. Gray*, 4 Esp. N. P. C. 178.

* *Cobden v. Bolton*, 2 Camp. N. P. C. 108.

† *Ibid.*

discouraged from adventuring their fortunes as owners of vessels, to the prejudice of trade and navigation, it is enacted, that "the owners of vessels shall not be liable for any loss or damage, by reason of any embezzlement, secreting, or making away with (by the master or mariners) of any goods shipped on board any vessel, or for any act, matter, or thing, damage, or forfeiture, done, occasioned, or incurred by the master or mariners, or any of them, without the privity and knowledge of the owners, further than the value of the vessel with her appurtenances and freight for the voyage, wherein the embezzlement, &c. shall be made."

An action was brought against the owner of a vessel to recover the value of a quantity of dollars^x, shipped by the plaintiff on board the defendant's vessel, bound from London for Hamburg. The dollars had been taken during the night, by force, from on board the vessel, by a number of fresh water pirates, as the vessel lay at anchor in the Thames. The defendant relied on the preceding statute, proving that one of the mariners was accessory in the robbery, by giving intelligence. The court of King's Bench were of opinion, that this case fell within the words, "any act, matter, or thing, done, occasioned, or incurred, by master or mariners, or any of them," and, consequently, that the defendant was not liable beyond the value of the vessel and freight.

The preceding statute afforded a very inadequate protection to the owners of vessels, for they still remained liable for the full amount of goods lost by robbery, embezzlement, &c. *to which the master or mariners were not privy*, and the case of a loss by fire was wholly unprovided for by that statute; to remedy these inconveniences, and for the further encouragement of trade and navigation, the statute 26 G. 3. c. 86. s. 1. has confined the liability of the owners of vessels for any loss or damage, by reason of any robbery, embezzlement, &c. without the privity of the owners, to the value of the vessel and freight, *although the master or mariners are not concerned in, or privy to, such robbery, embezzlement, &c.* The second section exempts the owners of vessels entirely from answering for any loss by fire. And by the third section, "the owners of vessels shall not be liable to answer for any loss happening to any gold, silver, diamonds, watches, jewels, or precious stones, by reason of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper, at the time

^x Sutton v. Mitchell, 1 T. R. 19.

“ of shipping, insert in his bill of lading, or otherwise declare in writing to the master or owner of the vessel, the nature, quality, and value, of such gold, &c.” The fourth section directs, that the freighters or proprietors shall receive satisfaction in average, in proportion to their respective losses, if the value of vessel and amount of freight shall not be sufficient to make them full compensation; and empowers the freighters or proprietors, or any of them, in behalf of himself and the other proprietors, or the owners of the vessel, to exhibit a bill in equity for the discovery of the amount of the losses, and also of the value of the vessel and freight, and for an equal distribution and payment thereof among the freighters in proportion to their losses; provided that, where the part-owners of the vessel exhibit the bill, they shall annex an affidavit, negating collusion with any of the defendants; and shall thereby offer to pay the value of the vessel and freight as the court shall direct, whereupon the court shall ascertain the value, and direct payment thereof, as in the case of bills of interpleader.

The preceding statutes do not affect the liability of masters and mariners’.

By stat. 3 and 4 W. & M. c. 12. s. 24. “ Justices of the peace of every county and place in England or Wales, are empowered at the next quarter or general sessions after Easter day, yearly, to assess and rate the prices of all land carriage of goods, brought into any place within their jurisdiction, by any common waggoner or carrier, and to certify the rates to the mayors and chief officers of the market towns within their jurisdiction, to be hung up in some public place; and waggoners or carriers taking more than the rate fixed, shall forfeit 5*l.* to be levied by distress and sale of goods, by warrant of two justices, where the waggoners or carriers reside.” And by stat. 21 G. 2. c. 28. s. 3. reciting the preceding provision, and further, that no rates for the carriage of goods from distant parts of the kingdom to London, and places adjacent, had been yet settled, and that several common waggoners had thence taken occasion to enhance the price of carriage of goods to the prejudice of trade, it is enacted, “ that every common waggoner or carrier, who shall demand and take any greater price for the bringing goods to London, or to any place within the bills of mortality, than is settled by the J. P. for the county or place whence such

“ goods are brought, for the carrying goods from London
 “ to such county or place, shall for every such offence for-
 “ feit and pay 5*l.* to the use of the party grieved; to be re-
 “ covered as by stat. 3 & 4 W. & M. or by distress and
 “ sale of goods, by warrant under the hands and seals of
 “ two J. P. for the counties of Middlesex, Surry, city of
 “ London, or Westminster; and the respective clerks of
 “ the peace are directed after Easter sessions, yearly, to cer-
 “ tify to the Lord Mayor of London, and to the respective
 “ clerks of the peace for Middlesex, Surry, and Westmin-
 “ ster, the rates so made; which certificate, or an attested
 “ copy thereof signed by the officer, to whom the same
 “ shall be so transmitted, shall be evidence of the rates and
 “ prices set for the carrying goods to any county or place.”

A doubt is expressed in a note to *Kirkman v. Shawcross*,
 6 T. R. 18. n. (a) whether the last-mentioned statute is not
wholly repealed by stat. 7 Geo. 3. c. 40., but upon an exami-
 nation of that statute, s. 60., it will be found that there is
 an express exception of what relates to the rate or price
 for carriage of goods. It seems, therefore, that the pre-
 ceding clause is still in force.

III. *Of the Lien of Carriers.*

By the custom of the realm, a common carrier is bound
 to carry the goods of the subject for a reasonable reward, to
 be therefore paid, by force of which he has a lien² as far as
 the carriage price of the particular goods, but not to any
 greater extent. As of late years common carriers have on
 the one hand limited their responsibility by general notices,
 so on the other hand they have been attempting to extend
 their lien, so as to cover their general balances, or in other
 words, they have claimed a general lien. In a late case
 (*Rushforth v. Hadfield*, 6 East's R. 519. 7 East's R. 224.) it
 seems to have been admitted by the court, that the lien
 claimed by a carrier for his general balance, was not founded
 on the common law, but that such a lien might arise by con-
 tract between the owner of the goods and the carrier; and
 that usage of trade, if general, uniform, and long established,

² *Skinner v. Upshaw, Ltd.* Raym. 752.

was evidence of such contract (13). But it was resolved, that, *as general liens were not to be favoured*, the party who sets up such a claim ought to make out a very strong case, and evidence of a few recent instances of detainer by carriers, for their general balance, would not be sufficient to furnish an inference, that the party who dealt with a carrier, had knowledge of the usage, and so to warrant a conclusion, that he contracted with reference to it, and adopted the general lien into the particular contract.

It is to be observed, that liens at law exist only in cases where the party entitled to them has the possession of the goods; consequently, if a carrier parts with the possession of the goods, after the lien attaches, the lien is gone.

An usage for carriers to retain goods^a, as a lien for a general balance of account between them and the consignees, does not affect the right of the consignor to stop the goods *in transitu*.

^a *Oppenheim v. Russel*, 3 Bos. & Pul. 42.

(13) See *Naylor v. Mangles*, 1 Esp. N. P. C. 109. where it was contended, that a wharfinger had a lien for his general balance; Lord Kenyon C. J. said, "that liens were either by common law, usage, or agreement. Liens by the common law were given where a party was obliged by law to receive goods, &c., in which case, as the law imposed the burthen, it also gave him the power of retaining for his indemnity. This was the case of inn-keepers; that a lien from usage was a matter of evidence. The usage in the present case had been proved so often, he said it should be considered as a settled point, that wharfingers had the lien contended for." And in *Spears v. Hartly*, 3 Esp. N. P. C. 81. Lord Eldon C. J. (on the authority of the preceding case) held, that a wharfinger had a lien for his general balance, and further, that, although the balance was of more than six years standing, the wharfinger might retain the goods by virtue of his general lien, for the debt was not discharged by the operation of the Statute of Limitations, but the remedy only. See also *Aspinall, assignee of Howarth v. Pickford*, 3 Bos. & Pul. 44. n. (a) Trover for goods. The defence was, that the goods were put by Howarth into the hands of the defendant, as a carrier, to be forwarded from Manchester to his warehouse in London, and that the defendant was entitled to retain against the estate for the general balance due from H. for the carriage of the goods. This right was established by evidence of the defendant having before claimed and been allowed to retain for his general balance, both against bankrupt estates and solvent customers, and also, by the evidence of a principal carrier on the western road to the same effect, respecting himself.

A carrier^b who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has not any right to retain them against the consignee for a general balance due to him for the carriage of other goods of the same sort, sent by the consignor.

IV. *By whom Actions against Common Carriers ought to be brought.*

THE action against a carrier, for the non-delivery or loss of goods, must be brought by the person in whom the legal right of property in the goods in question is vested at the time; for he is the person who has sustained the loss, if any, by the negligence of the carrier, and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured^c. Hence where a tradesman orders goods to be sent by a carrier, as at the instant when the goods are delivered to the carrier, such delivery operates as a delivery to the purchaser, and the whole property (subject only to the right of stoppage *in transitu* by the seller) vests in the purchaser, he alone can maintain an action against the carrier for any loss or damage to the goods; and this rule holds as well where the particular carrier is not named by the purchaser^d (14) as where he is^e; and it holds as well in the case of a carrier by water as where the goods are conveyed by land.

The plaintiff had shipped goods^f on board the *Mercurius*, of which the defendant was owner, to be carried from

^b *Butler v. Woolcott*, 2 Bos. & Pul. N. B. 64.

^c *Dawes v. Peck*, 8 T. R. 330. 1 Atk. 248. S. P.

^d *Dutton v. Solomonson*, 3 Bos. and Pul. 584.

^e *Dawes v. Peck*, *supra*.

^f *Brown v. Hodgson*, London Sittings, B. R. 2d March, 1809, 2 Camp. N. P. C. 36.

(14) Delivery of goods by the vendor, on behalf of the vendee, to a carrier, although not named by the vendee, is a delivery to the vendee. *Dutton v. Solomonson*, 3 Bos. & Pul. 582. And the goods are immediately upon the delivery to the carrier at the risk of the vendee, although the carrier is to be paid by the vendor. *King v. Meredith*, 2 Camp. N. P. C. 639.

London to Tonningen. The goods, (as appeared by an admission on the part of the plaintiff,) were expressed in the bills of lading, to be shipped by order and on account of Hesse and Co. of Hamburgh. The ship arrived in the river Eyder, but was prevented from proceeding to Tonningen by the commander of one of his Majesty's frigates, and ordered to return home. After her return, the captain made an affidavit, that he believed the cargo to be Danish property; whereupon, the goods were unloaded and delivered over to the admiralty marshal, and libelled in the admiralty court: the plaintiff afterwards recovered them by a proceeding in that court. The action was brought to recover the expenses incurred by the suit in the admiralty. On the part of the defendant it was insisted, that the goods being shipped by order, and on account, of Hesse and Co. the property vested in them immediately on their being shipped on board the *Mercurius*. *Dawes v. Peck*, and *Dutton v. Solomonson*, were cited. It was also urged, that a recovery by the present plaintiff could not protect the defendant from an action at the suit of Hesse and Co. On the part of the plaintiff it was contended, that there was a distinction between the carrying goods from one part of England to another, and the transporting them beyond sea. That after a delivery of goods to a carrier, to carry them from one part of England to another, the vendor had no property in the goods, but only a right of stopping *in transitu*: and it was admitted, that if the goods were directed to be sent by a carrier, without specifying the carrier, the delivery to the carrier was a delivery to the vendee; but urged that, in the case of goods sent abroad, if the goods arrived safe, they were to be paid for; aliter, if they do not arrive. Lord Ellenborough C. J. "They are shipped by order, and on account, of Hesse and Co. I can recognize no property but that recognized by the bill of lading." Plaintiff nonsuited.

It is observable, that in the case of *Davis v. James*, 5 Burr. 2680, it was holden, that the *consignor* might maintain the action; but the ground of that decision was, that the consignor had made himself responsible to the carrier for the price of the carriage. In *Moore v. Wilson*, 1 T. R. 659, where the action was brought by the consignor, and the plaintiff having averred in his declaration, that the hire was to be paid by him, proof that the hire was to be paid by the consignee was holden not to be a variance, on the ground that whatever might be the contract, between the vendor and the vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable.

V. Of the Declaration.

FORMERLY the declaration in actions against common carriers stated their employment as common carriers^g, their liability by the custom of the realm, a delivery to, and acceptance by the defendants of the goods to be carried, for a reasonable hire or reward, concluding with the loss or damage to the goods; but the modern practice is not to declare in this form, but in assumpsit (15), and not to state either the employment of the defendants as common carriers, or the custom of the realm (16) as to their liability. This

^g Herne's Plead. 76. Vid. Ent. 37, 38.

(15) It may be observed, however, that where the circumstances of the case require a count in trover to be added, the ancient form of a declaration is adhered to, or (what is more usual) a concise form, analogous to the ancient form, and founded on a breach of duty, is adopted. It is worthy of remark, that Denison J. said, in *Dale v. Hall*, B. R. H. 24 G. 2. MSS. that where the action was founded on the custom, it was *ex contractu*, and that trover and an action on the custom could not be joined; and in *Boson v. Sandford* and another, Salk. 440. the court held, that an action, charging* the defendants with a breach of their duty as carriers, was not an action *ex delicto*, but *ex quasi contractu*, and on this ground they decided, that the action being brought against two of four part-owners of a ship could not be sustained, although the defendants had not pleaded this matter in abatement, but had relied on the general issue, not guilty. This case, however, as to the taking advantage of the omission of some of the partners on the general issue, has been overruled in *Rice v. Shute*, 5 Burr. 2611, and in subsequent cases (see ante, p. 110, n. 64); and as to the form of the action, *Boson v. Sandford* was overruled in *Dickon v. Clifton*, 2 Wils. 319, which was recognized by Lord Ellenborough C. J. delivering the judgment of the court in *Govett v. Raduidge*, 3 East's R. 62.

(16) "The custom of the realm is the law of the realm†, and consequently it need not be set forth in the declaration." Per Denison J. in *Dale v. Hall*, MSS. and per Lord Hardwicke C. J. in *Boucher v. Lawson*, Ca. temp. Hard. 199. See also Hargrave's Co. Litt. p. 89 a. n. 7. "It seems not only unnecessary, but even improper, to recite the custom in the declaration, because it tends to confound the distinction between *special* customs, which ought to be pleaded, and the *general* custom of the realm, of which the courts are bound to take notice without pleading."

* See the declaration, 2 Show. 478. & Carth. 158.

† 1 Inst. 115 b. Flob. 18.

form of declaration has prevailed since the decision of *Dale v. Hall*, M. T. 1750, in which it was settled, that it did not make any difference, whether the plaintiff declared on the custom, or, more generally, in *assumpsit*; for, by stating that the defendant carried for hire, it would appear that the defendant was a common carrier, and then the law would raise the promise from the nature of the contract. But although the plaintiff is not bound to allege the custom, yet he must produce sufficient evidence to bring his case within the custom^h.

The advantage resulting to the plaintiff from declaring in *assumpsit* is, that he may join the common counts with the special counts in *assumpsit*, if he has other causes of action to which they are applicable. The inconvenience which arises from declaring in *assumpsit* is, that it lets in a plea of abatement for want of joining all the parties, and it excludes the right to join a count in *trover*. If the plaintiff is desirous of avoiding this inconvenience, he may either pursue the ancient method of declaring with a recital of the custom, or he may adopt a more general form (omitting the recital of the custom) and allege his gravamen as consisting in a breach of duty arising out of an employment for hire, and may consider that breach of duty as a tortious negligence. Thus declaring in tort, the plaintiff will be permitted to add a count in *trover*, the defendant will be ousted of his plea in abatementⁱ, on the ground of not joining all the parties; and further, if the action is brought against several defendants, and some are found guilty, and others acquitted, the plaintiff will, notwithstanding, be entitled to judgment against those who have been found guilty^k.

The reader, however, should be apprised, that the doctrine laid down in *Govett v. Radnidge* is opposed by two decisions in the court of Common Pleas, viz. first, by the case of *Powell v. Layton*, 2 Bos. & Pul. N. R. 365, in which it was determined, that a declaration against a carrier by water, stating "that he had received goods to carry for freight, but that he had not delivered them according to his duty," was founded in contract; and that to a declaration so framed the defendant might plead that he was only liable jointly with his partners, and that his partners were not sued; and, secondly, by the case of *Max v. Roberts* and eight others^l: there the gravamen was alleged as consisting

^h Per Lord Hardwicke C. J. in *Boucher v. Lawson*, H. 9 G. 2. B. R. Ca. temp. Hard. 199.

ⁱ *Mitchell v. Tarbutt*, 5 T. R. 649.

^k *Govett v. Radnidge*, B. R. 3 East's R. 62.

^l 2 N. R. 454.

in a breach of duty as ship-owners arising out of an employment for freight. The plaintiff could not prove all the defendants to be owners; the court were of opinion, that, as the action was founded in contract, it was incumbent on the plaintiff to prove all the defendants to be owners, and having failed in that, he could not recover against those who were proved to be owners. A writ of error was brought, which, having been twice argued in the court of King's Bench, was adjourned to the Exchequer Chamber, as it was supposed that a decision in this case might settle and put at rest the question upon which the contrary judgments had been given; but after argument, the twelve judges were unanimously of opinion, that both the counts of the declaration were so defective in several material respects, (*perfectly collateral to the question upon which the determination of the judges was sought*) that no judgment could be given for the plaintiff upon either of them^m.

It will be proper to remark here, that *trover* will not lie against a common carrier for merely *losing* goods entrusted to his care, without any actual wrongⁿ (17). The proper form of action is the action on the case before mentioned.

Although goods are spoiled by the default of the master of the ship, yet the owners are liable in respect of the freight^o, if charged on the custom of the realm, or as usually carrying for hire, or upon an express undertaking; but not otherwise^p. In this case the declaration (if in *assumpsit*) ought to be against all the owners; but if one or more are

^m *Max v. Roberts*, 12 East, 89. But see *Weall v. King*, 12 East, 452.
ⁿ *Ross v. Johnson*, 5 Burr. 2825.
Kirkman v. Hargreaves, (case from Lancaster Sum. Ass. 1800, before Graham B.) B. R. H. 41 G. 3. MSS. S. P.

^o *Boson v. Sandford*, Salk. 440. 3 Lev. 258. 1 Show. 29. 2 Show. 478. Skin. 278. 3 Mod. 321. Carth. 58. S. C.
^p *Boucher v. Lawson*, Ca. temp. Hardw. 194.

(17) But if the carrier has the goods in his custody at the time when he refuses to deliver them, this will be evidence of a conversion. Salk. 655. So *trover* will lie against a carrier who delivers goods to a wrong person through mistake. Per Kenyon C. J. *Youl v. Harbottle*, Peake's N. P. C. 49. The owner of goods on board a vessel directed the captain not to land them on the wharf, against which the vessel was moored, which the captain promised not to do, but afterwards delivered them to the wharfinger, conceiving that the wharfinger had a lien on the goods for wharfage fees; it was holden, that the owner might maintain *trover* against the captain, who could not prove that any wharfage duty was due. *Syeds v. Hay*, 4 T. R. 260.

not named as defendants, advantage can be taken of the omission by plea in abatement only^q. The same rule holds with respect to all common carriers who are partners, or who make a joint contract.

A ship was chartered to the commissioners of the navy as an armed vessel^r, who put on board a commander in the navy and a king's pilot, the master and crew being appointed and paid by the owners. In consequence of the improper execution of an order given by the commander, the chartered ship ran foul of another ship. It was holden, that the owners of the chartered ship were liable for the injury which the other ship sustained; for the chartered ship, notwithstanding it had an officer on board, was, with regard to third persons, to be considered as the ship of the owners.

A notice by a carrier limiting his responsibility to a certain sum^s, unless goods above that value are entered and paid for accordingly, amounts only to a limitation of damages, after a right to them has accrued by a breach of the contract, and is matter proper to be given in evidence to the jury in reduction of damages, but forms no part or qualification of the original contract for carriage, and, consequently, is not necessary to be shewn to the court in the first instance on the face of the record. Hence, in a case of this kind, a declaration in the usual form^t is sufficient.

VI. *Of Payment of Money into Court.*

In an action of assumpsit against a carrier^u, to recover the loss sustained upon goods which had been put on board the defendant's barge, and which had been spoiled in consequence of the cargo being sunk, the defendant was not allowed to pay the invoice price into court, the rule being^x, that money cannot be paid into court in cases of uncertain damages.

In assumpsit against a common carrier for losing a trunk belonging to the plaintiff^y, of the value of 50*l.* the defendant moved for leave to pay 20*l.* into court, upon an affida-

^q Rice v. Shute, 5 Burr. 2611.

^r Fletcher v. Braddick, 2 Bos. & Pul. N. R. 182.

^s Clarke v. Gray, 6 East's R. 564.

^t S. C.

^u Fail v. Pickford, 2 Bos. & Pul. 234.

^x Tidd's Pract. 2d edit. p. 537.

^y Hutton v. Bolton, 1 H. Bl. 299. n.(h.)

vit, stating that he had published an advertisement that he would not be answerable for any parcels above the value of 20*l.* unless he was paid in proportion to the risk, and that, in the present case, the parcel exceeded that value, yet the defendant had not been paid any thing extra for the carriage. The court of King's Bench permitted the money to be paid into court, observing, that, as the declaration did not state any damage independently of the loss, the plaintiff could not recover beyond the value of the goods; for which reason the declaration did not differ from the common case of goods sold and delivered.

In the preceding case the consequences of paying money into court were not attended to; but, in a subsequent case of *Yate v. Willan*, 2 East's R. 128, where in assumpsit by the owner of a trunk of the value of 15*l.* which had been lost by the defendant, the declaration stated a general undertaking by the defendant to carry goods safely for hire, and the defendant paid 5*l.* into court; it was holden, that the defendant could not give in evidence a notice "that he would not be responsible for more than 5*l.* for any property lost, unless the same was booked, and paid for according to the value," and that the trunk in question had not been so paid for; because the payment of money into court, upon a count stating a special contract, was an admission of such contract, and narrowed the inquiry to the quantum of damages sustained by the breach thereof (18).

VII. Evidence.

ASSUMPSIT against the defendant^z, (a keelman) as a common carrier, for damage done to goods delivered to his custody for safe carriage. On *non assumpsit*, the plaintiff proved the damage by water in the hold of the vessel. The judge permitted the defendant to produce evidence to shew,

^z *Dale v. Hall*, B. R. 1 Wils. 281. & MSS.

(18) The authority of this case has been shaken in *Clark v. Gray*, 6 East's R. 570, in which Lord Ellenborough, delivering the judgment of the court, said, "that the case of *Yate v. Willan*, could not be supported in its full extent; for although the payment of money did admit the contract as stated in the declaration, it did not admit a contract incompatible with the restrictive provision as to the amount of damages to be recovered in case of loss."

that there had not been any negligence on his part. On a motion for a new trial, it was insisted, that the evidence given for the defendant ought not to have been received. The court were of opinion, that this evidence was not admissible; Lee C. J. observing, that goods delivered to common carriers were to be kept safely, except against acts of God or king's enemies; that all other excuses amounted to negligence, and, not being legal excuses, evidence of them was immaterial, as not being any answer to the undertaking.

In an action against the owner of a vessel^a, for not safely carrying the goods of the plaintiff, the plaintiff called the master of the vessel, whom he had released, as a witness to prove his case, *Ld. Kenyon* C. J. admitted him, observing, that the master had not any immediate interest; that the record in this cause would not be evidence for or against him in an action brought against him; and although it should appear, that the vessel was lost through the negligence of the witness, yet the present defendant was liable to the plaintiff; consequently, taking it either way, he was a good witness.

A book-keeper to a carrier is a good witness for him, of necessity, without a release^b.

^a *Lay v. Holock*, *Peake's N. P. C.* 101. ^b *Spencer v. Goulding*, *Peake's N. P. C.* 129.

CHAP. XI.

COMMON.

- I. *Of Right of Common.*
- II. *Of Common of Pasture, and herein of Common appendant, Common appurtenant, and Common in gross.*
- III. *Of the Interest of the Owner of the Soil subject to Right of Common; and herein of Approvement and Enclosure.*
- IV. *Of the Remedy for Disturbance of Right of Common.*
- V. *Of Surcharges by Commoners.*
- VI. *Evidence.*

I. *Of Right of Common.*

RIGHT of Common is an incorporeal hereditament, or a right (lying in grant) which certain persons have to take or use in common, a part of the natural produce of land (1), water (2), wood (3), &c. belonging to other persons, who have the permanent or limited interest in the soil, &c.

If a person claim by *prescription* any species of *common* in the land of another, and that the owner shall be excluded to have pasture, estovers, or the like, this is a prescription against law^a. But a person may prescribe for the *several*

^a 1 Inst. 122 a.

(1) Common of pasture, and common of turbary.

(2) Common of fishery.

(3) Common of estovers.

pasture, and exclude the owner of the soil from feeding his cattle there^b.

A person may have two distinct substantial grants of rights of common over different wastes, from *different lords*, in respect of the *same* tenement^c; and immemorial usage is evidence of such distinct grants.

If A. has a common by prescription^d, and takes a lease of the land for twenty years, whereby the common is suspended; after the years ended, A. may claim the common generally by prescription; for the suspension was to the possession only and not to the right, and the inheritance of the common did always remain (4).

II. Of Common of Pasture; and herein of Common appendant, Common appurtenant, and Common in gross.

Common of pasture is, where one person has, in common with other persons, the right of taking by the mouths of his cattle, the herbage growing on land of which some other person is the owner.

Common of pasture is either common appendant, common appurtenant, or common in gross.

With respect to two other kinds of common of pasture, which are sometimes mentioned in the books, viz. common of vicinage, and common in gross *sans nombre*, or without stint; it may be observed, that the former cannot, strictly speaking, be a *right* of common^e, for if it were, it would prevent an enclosure, which it has been always holden that

b 1 Inst. 122 a. *Hoskins v. Robins*, d 1 Inst. 114 b.

2 Saund. 324.

c *Hollinshead v. Walton*, 7 East, 485.

e *Musgrave v. Cave*, Willes, 322. 1 Inst. 122 a.

(4) Title once gained by prescription or custom, cannot be lost by interruption of the possession for 10 or 20 years; but by interruption in the right it may; as if a man had a rent or common by prescription, unity of possession of as high and perdurable estate, is an interruption in the right. 1 Inst. 114. b. When a prescription or custom makes a title of inheritance, the party cannot alter or wave the same in pais.

it will not; the truth is, it is only an excuse for a trespass. Where there is a partial enclosure^f, common by vicinage still continues. As to common in gross *sans nombre*, it has been truly said, that the notion of this species of common, in the latitude in which it was formerly understood, has been exploded long ago^g (5), and it cannot have any rational meaning, but in contradistinction to stinted common, where a man has a right to put on the common a certain number of cattle only.

Common appendant^h is of common right (and therefore a man need not prescribe for itⁱ) (6), for beasts commonable, that is, that serve for the maintenance of the plough, as horse and oxen, and for kine and sheep to manure the land, and is appendant to *ancient arable land* only^k. It must have existed from time immemorial^l. It must be claimed in the waste of the lord, not for a certain number of cattle, but for such only as are levant and couchant on the land, and therefore it cannot be severed, not even for a moment, nor turned into common in gross. The reason for common appendant appears to be this; that as the tenant would necessarily have occasion for cattle^m, not only to plough, but likewise to manure his own land, he must have some place to keep such cattle in, while the corn is growing on his own arable land; and therefore of right (if the lord had any waste) the tenant might put his cattle there, when they could not go on his own arable land; hence it is plain, that levancy and couchancy (7) are incident to common appendantⁿ, namely, that

^f Gullett v. Lopes, 13 East, 348.

^g Bennett v. Reeve, Willes, 932.

^h 1 Inst. 122 a. Bro. Abr. Comon. 1.

ⁱ Bro. Abr. Comon. pl. 11. 35.

^k 4 Rep. 87 b. Willes, 392.

^l 26 H. 4 a.

^m Bennett v. Reeve, Willes, 931.

ⁿ 1 Roll. Abr. 399. l. 1.

(5) In Mellor v. Spateman, 1 Saund. p. 346. c. Serj. Wms. edition, Kelynge C. J. said positively, that there could not be any common in gross *sans nombre*. See also Benson v. Chester, 8 T. R. 396. where it was holden, that a claim of a right of common, without stint, as annexed to an ancient messuage, without land, could not be supported, such a right of common not existing in law.

(6) Common appendant must have existed from time immemorial, but it ought not to be claimed by prescription. The proper way of pleading it is, that the party was seized in fee of certain arable land, to which he had common appendant in the locus. See 4 H. 6. 13. a.

(7) Levancy and couchancy means the possession of such land as will keep the cattle claimed to be commoned during the winter,

the tenant can only have a right of common for such cattle as are levant and couchant on his estate, that is, for such and so many as he has occasion for to plough and manure his land, in proportion to the quantity thereof (8).

Common appendant being of common right, may be apportioned, by alienation of part of the land to which the common is appendant^o; and, if the land be divided ever so often^p, each parcel of land is entitled to common appendant.

Although the commoner purchases part of the land in which he is entitled to common, yet the common shall be apportioned^q, because common appendant is of common right^r; but otherwise it is of common appurtenant^s.

Common appurtenant is a right of common founded on a grant^t, or prescription^u, (which supposes a grant) annexed to the enjoyment of land. This species of common may be granted for all manner of cattle, that is, not only for those which serve for the maintenance of the plough, and to manure the land, but for swine, goats, and the like^v; it may be granted for an unlimited number, or for a certain number of cattle. Where common appurtenant is granted for an unlimited number of cattle, the measure of profit which the commoner is to have, is, as in the case of common appendant, levancy and couchancy^w; and, consequently, like common appendant, such common appurtenant cannot be converted into common in gross. But common appurtenant for a certain number of cattle may be granted over, and so become common in gross.

Common appurtenant may be granted at this day; and may be apportioned^x by a conveyance of part of the land to which the right is appurtenant (9).

^o 1 Inst. 122 a.

^p Per Willes C. J. Willes, 230, 231.

^q 8 Rep. 79 a.

^r 1 Inst. 122 a.

^s Ib.

^t Cro. Car. 482.

^u 1 Inst. 122 a.

^x 1 Inst. 122 a.

^y 1 Rol. Abr. 398. (1) pl. 1. Drury v. Kent, Cro. Jac. 15.

^z Adjudged, Hob. 235. 1 Inst. 122 a.

and as many as the land will maintain during the winter, shall be said to be levant and couchant. Per Buller J. in Scholes v. Hargreaves, 5 T. R. 48, 49. But see Rogers v. Benstead, post, tit. Evidence.

(8) "It is plain that a person cannot have a right of common appendant for cattle which he borrows, unless he make use of them all the year to plough or manure his land." Per Willes C. J. in Bennett v. Reeve, Willes, 231, 2.

(9) This point was determined also in Sacheverill v. Porter, Cro.

Common appurtenant, as well as common appendant, may become extinct by unity of possession^a.

To an action of trespass defendant pleaded a prescriptive right of common for all his cattle, levant and couchant, upon a messuage, *cum pertinentiis*^b: on demurrer, it was insisted, that the prescription was not good, for the cattle could not be levant and couchant on a messuage. Holt, in support of the plea, contended, that a messuage comprehended a curtilage, which might be an acre or more, upon which the cattle might be levant and couchant: the court being of this opinion adjudged the prescription to be good.

In an action on the case for disturbing the plaintiff's right of common^c, it appeared, that the plaintiff (who claimed the common in respect of a messuage *for all* commonable cattle, levant and couchant) was the owner of a small house wherein he carried on the trade of a butcher. The house had neither land, curtilage, nor stable belonging to it, but under the shop window was a sheep-hold, which would contain four or five sheep at a time, but neither horse nor bullock could be kept there: Lord Kenyon C. J. at the trial, on the northern circuit, being of opinion that levancy and couchancy was not proved, as the plaintiff had not shewn that he was in possession of land whereon the cattle might be levant and couchant, nonsuited the plaintiff. The court of B. R. afterwards concurred in opinion with the chief justice.

Common of pasture, without land, for a certain number of sheep, may be parcel of a manor^d, and demised and demisable by copy of court roll; and, if it be thus claimed in pleading by the lord of the manor, the plea will be good, although he does not describe the common as common appendant, appurtenant, or in gross, since it must be taken to be common appurtenant; for, not being claimed as incident to arable land, but to the manor, for a certain number of sheep in the soil of another, it cannot be common appen-

^a Bradshaw v. Eyre, Cro. Eliz. 570.

^c Scholes v. Hargreaves, 5 T. R. 46.

^b Scamler v. Johnson, T. Jon. 227.

^d Musgrave v. Cave, Willes, 319.

² Show. 248. S. C.

Car. 482. where a right of common in a waste having been granted to A., (who was seised of lands in S.) and all his tenants in S. for all commonable cattle, and A. conveyed parcel of the lands in S.; it was holden, that the alienee was entitled to common for all his commonable cattle, levant and couchant, on the parcel of the lands conveyed.

dant; nor can it be taken to be common in gross, being stated in the plea to be parcel of a manor; then it must be common appurtenant, the only remaining sort of common.

Common in gross is so called^a, because it does not appertain to any land, and it must be by grant or prescription. This species of common may be granted for all manner of cattle, and for an unlimited number, or for a certain number of cattle. If granted for an unlimited number, it seems that the grantee may put on any number of cattle, provided he leaves sufficient common for the lord; if granted for a certain number, the enjoyment of the right is of course limited by the number specified in the grant. A corporation may prescribe for common in gross, for cattle *levant and couchant*, within the town, but not for common in gross *sans nombre*^f. A right of common in gross is a tenement^g within the stat. 13 & 14 Car. 2. c. 12. s. 1.

III. *Of the Interest of the Owner of the Soil subject to Right of Common; and herein of Approvement and Enclosure.*

In land subject to a right of common, the right of the lord or owner of the soil (10) ought to be so exercised as not to injure the right of common. But the right of the commoners may be subservient to the right of the lord in the soil^h, so that the lord may dig clay pits there, or empower others to do so, without leaving sufficient herbage for the commoners, if it can be proved that such a right had been constantly exercised by the lord. So the lord mayⁱ, with

^a 1 Inst. 122 a.

^f Mellor v. Spateman, 1 Saund. 343.

^g R. v. Dersingham, 7 T. R. 671.

^h Bateson v. Green, 5 T. R. 411.

ⁱ Folkard v. Hemmett, 5 T. R. 417. n. (a.)

(10) The customary tenants of a manor may allege a custom to have the sole and several pasture in the soil of the lord for *the whole year*, and thereby exclude the lord. *Hoskins v. Robins*, 2 Saund. 324. But even in this case the lord may distrain, for *other* damage in his soil, the cattle of any who have no right to put in their cattle, although he has not any interest in the soil. Per Hale C. J. S. C. for he has an interest in the mines, trees, bushes, &c. Per Car. 1 Vent. 164.

the consent of the homage, grant part of the soil for building, if he has immemorially exercised such right. The immemorial exercise of such right by the lord is evidence, that he reserved that right to himself, when he granted the right of common to the commoners.

In like manner, there may be a valid custom in a manor, within the limits of an ancient forest belonging to the crown, for the lord, with the assent of the homage, to grant parcels of the waste to be holden by copy of court roll, and for the grantees to enclose the same, and to hold them in severalty against the commoners, and in exclusion of their rights^k.

If a commoner having right of common for one beast, put on two^l, the lord can only distrain the one put on last, unless they were both put on together; and it must be shewn in a plea (justifying the taking as a surcharge) whether they were put on together or separately, and if the latter, which was put on first (11). By stat. 20 H. 3. c. 4.^m lords of woods, wastes, and pastures, in which their tenants have common of pasture, may approve such wastes, &c. provided sufficient pasture, with a sufficient ingress and egress, is left to the tenants.

^k Boulcott v. Winmill, 9 Camp. N. P. C. 261.

^l Ellis v. Rowles, Willes, 638.

^m Extended by stat. 13 Edw. 1. stat. 1. c. 46. to approvements by lords

against their neighbours—Confirmed by stat. 3 & 4 Edw. 6. c. 3. See also stat. 29 G. 2. c. 36. amended by stat. 31 G. 2. c. 41.

(11) In replevin for taking the plaintiff's sheep on Whitemanslie down, the defendant avowed taking the cattle doing damage to his right of common; the plaintiff in his plea in bar claimed a right of common for himself as tenant of eight acres of land, for two sheep for every acre; the defendant (admitting the right of common claimed by the plaintiff) replied, that, at the time of the distress, the plaintiff had sixteen sheep on the common, over and above the sixteen that were distrained; that the defendant left the first mentioned sixteen to use the common, and only distrained the supernumerary sixteen, with which the plaintiff had overcharged it of his own wrong, which were doing damage to the plaintiff. It does not appear that in this case any objection was made to the replication, for not stating, whether the thirty-two sheep were put on together, or separately. Indeed the only question made was, whether one commoner could distrain the cattle of another commoner, who had surcharged the common, which was determined in the negative; and the plaintiff had judgment. *Hall v. Harding and others*, B. R. E. 9 Geo. 3. 4 Burr. 2426. 1 Bl. R. 673. S. C.

If the lord make a feoffment of the waste, &c. the feoffee may approve, leaving a sufficiency of common; and this rule holds, although the lord continues seized of the manor within which the waste lies; for though in the statutes of Merton and Westminster the lord only is mentioned, yet as in those days statutes were not drawn with that fulness of expression which they are at the present time, the term, "lord of the manor," must be considered as equivalent to "owner of the soil," where they stand in the same predicament. It is not necessary, therefore, that the person approving should be lord of the manor^a, a seisin in fee of the waste, &c. is sufficient. It is worthy of remark, that the statute of Merton does not empower the lord to approve against any other right of common^b, except that of common of pasture, appendant or appurtenant. It does not extend to common in gross^c, the words of the statute being *quantum pertinet ad tenementa sua*, nor to common of piscary, of turbary^d, estovers, and the like, the words used throughout the statute being *pastura et communia pasturae*^e. But though the lord cannot approve against common of turbary, yet where there is common of pasture, and common of turbary in the same waste^f, the common of turbary will not prevent the lord from justifying an enclosure against the common of pasture, if he leaves sufficient; for they are two distinct rights, and the concurrence of these rights in one person will not make any difference. In like manner the lord of the manor^g, or his grantee, may justify an approval or enclosure against tenants having common of pasture, although they have a further right of digging sand, &c. if sufficient common of pasture be left. It is, however, observable^h, that if the enclosure operates as an injury to the other rights, the commoner will be entitled to an action on the case for such injury.

By the approvement of part, agreeably to the rule laid down in the statute of Merton, that part is discharged of the common, insomuch, that if the tenant, who has the common, purchases that part, his common is not extinguished in the residueⁱ.

If the lord encloses any part, and does not leave sufficient

^a Glover v. Lane, 3 T. R. 445.

^b 2 Inst. 87.

^c 2 Inst. 86.

^d Grant v. Gunner, 1 Taunt. 435.

^e 2 Inst. 87.

^f Fawcett v. Strickland, Willes, 57.

Comp. Rep. 578. S. C.

^g Shakespeare v. Peppin, 6 T. R. 741.

^h Agreed in Fawcett v. Strickland, Willes, 57.

ⁱ 2 Inst. 87.

common in the residue, the commoner may break down the whole enclosure^y.

If the common has been enclosed 20 years, the commoner cannot make an entry, but must bring an assize of common^z.

IV. *Of the Remedy for Disturbance of Right of Common.*

WHATEVER destroys the right of common is a nuisance^a, and may be abated by the commoner, provided it can be done without interfering with the lord's right to, or interest in the soil. But if the nuisance cannot be abated, without such interference, the commoner must resort to his action on the case, and have satisfaction in damages. If the right of common be partially injured, the commoner ought not to abate the cause of such injury, more especially if in so doing he must necessarily, interfere with the right to the soil. On this principle it was holden in *Cooper v. Marshall*, 1 Burr. 265, that a commoner could not justify digging up the soil and destroying the coney-burrows erected in the common by the lord, who was entitled to free warren there. So where the lord had planted trees on the common, and the commoner cut them down^b, it was holden that the lord might maintain trespass, and that the commoner could not justify the abatement of the trees.

The usual remedy adopted by commoners is an action on the case for a disturbance of the right of common, which may be maintained either against the lord or the owner of the soil^c, a stranger or a commoner. If the action is brought against a wrong doer^d, title being only inducement, it is not necessary to set it forth; it will be sufficient for the plaintiff to state in his declaration, that he was possessed of a certain quantity of land, &c. and by reason of such possession was entitled to the right, in the exercise of which he was disturbed.

In this action the plaintiff must prove an injury sustained,

^y 2 Inst. 89.

^z *Creach v. Wilmot*, Derby Summ. Ass. 1752. cited by Lawrence J. in *Hawke v. Bacon*, 9 Taunt. 160.

^a 2 Inst. 88.

^b *Kirby v. Sadgrove*, 6 T. R. 483. B. R. confirmed in error in Exchequer Cha. 1 Bos. & Pnl. 13.

^c *Hassard v. Cantrell*, Lutw. 101.

^d *Strode v. Byrt*, 4 Mod. 418. See also *Greenhow v. Hsley*, Willes, 621.

but any injury in the minutest degree is sufficient^e; e. g. the taking away the manure which has been dropped on the common by the cattle, although the proportion of the damage sustained by the plaintiff be found to amount to a farthing only^f; for, if, where the injury was small, a commoner could not maintain an action, a mere wrong doer might by repeated torts in course of time establish evidence^g of a right of common.

If, to an action on the case by a commoner for injuring his right of common^h, the defendant plead, that he dug turves under a licence from the lord, he should add, that "sufficient common was left for the commoner:" and if he do not, the plaintiff is not obliged to reply, that there was not sufficient common left; because it is the gist of the action, and set forth in the declaration.

V. *Of Surcharges by Commoners.*

FORMERLY, if one of the commoners had surcharged the commonⁱ, that is, had put more cattle into the common than he was entitled to, the commoner who was aggrieved might sue out a writ of admeasurement of pasture, and by that suit the common was admeasured in respect of all the commoners, as well those who had not surcharged, as those who had surcharged it, and the person who brought the action. An action on the case has been substituted in the place of this writ of admeasurement, as a more easy and speedy remedy: and it has been holden, that this action may be maintained by one commoner against another for a surcharge^k, although the plaintiff himself has been guilty of a surcharge. In the declaration it is not necessary for the plaintiff to set forth the defendant's right of common, and shew in what manner he has exceeded that right^l, by putting in a greater number or an improper species of cattle; but the disturb-

^e Per Lord Ellenborough C. J. *Lidgold v. Butler*, Middlesex sittings after Trin. 48 G. 3. B. R. MSS.

^f *Pindar v. Wadsworth*, 9 East's R. 154.

^g See *Patrick v. Greenway*, 1 Wms. Saunders, p. 346. b. n. (2)

^h *Greenhow v. Hsley*, Willes, 619.

ⁱ F. N. B. 125. B.

^k *Hobson v. Todd*, 4 T. R. 71.

^l *Atkinson v. Temdale*, 3 Wils. 278.

^m Bl. R. 817. S. C.

ance may be alleged generally (12) thus, "that the defendant wrongfully and injuriously eat up and depastured the grass on the common with divers sheep and lambs, to wit, 200 sheep and 200 lambs." Neither is it necessary that the plaintiff should state that he was exercising his right of common at the time of the surcharge^m.

VI. Evidence.

In replevin defendant avowed taking the cattle damage feasantⁿ, plaintiff prescribed for common in the locus in quo as appendant to his messuage. The plaintiff produced as a witness a person who claimed common in the same place. His testimony being objected to, Raymond C. J. overruled the objection, observing that where a person prescribes for common, not as appendant to his messuage, but by virtue of a custom within a parish or manor, and the custom is in issue, there a person within the manor or parish claiming common is interested, and cannot be a witness: but where a person prescribes for common, for all cattle levant and couchant on his messuage, as belonging to that messuage, there is nothing but that person's particular right of common in question, as belonging to that particular messuage; and another person who claims common in the same place by virtue of another messuage, may be a witness, because not interested in the present question.

Trespass for entering plaintiff's close with cows and sheep, and destroying his grass^o. As to sheep, plea not guilty, and issue thereon. As to cows, defendant justified, and prescribed for common, for all cattle (except sheep) *levant and couchant* on defendant's messuage, and one acre of land; the issue was on the levancy and couchancy.

The evidence on the first issue was, that defendant's

^m Wells v. Watling, 2 Bl. R. 1233.
ⁿ Harvey v. Collison, Norfolk Sum.
 Ass. 1797. MSS. Serjt. Leed's.

^o Rogers v. Benstead, Cambr. Sum.
 Ass. 1797. cor. Ld. Raymond, C. J.
 MSS. Serjt. Leed's.

(12) It seems from Smith v. Feverel, 2 Mod. 6. and from a dictum of the court in Hassard v. Cantrell, Lutw. 107. that in an action against the lord, it is necessary to shew a particular surcharge.

sheep were seen at several times depasturing in *locus in quo*, and that at such time the defendant's shepherd was with them,

Mr. Gatward, (recorder of Cambridge) for the defendant, insisted, that as it did not appear that defendant had knowledge or consented, that his sheep should feed there, and had a servant to take care of them, the shepherd, and not the defendant, was the trespasser, and that the action could not be maintained against the master^p.

Per Lord Raymond C. J. "The action lies against the master, his sheep did the trespass; he has his remedy against the servant."

As to the second issue, the evidence was, that defendant was seized of a copyhold messuage, and one acre of pasture land, that he foddered eight or nine cows in the yard of the said messuage with hay brought from another farm about two miles off.

Lord Raymond C. J. "These cows cannot be levant and couchant upon the one acre; for I am clear that levancy and couchancy is a *stint of common in contradistinction to common sans nombre*, and signifies only so many as the messuage or farm will by its produce maintain; and it was so resolved in the case of the town of Derby^q. I know there are cases which say, that foddering in a yard makes levancy and couchancy, but then the meaning is, foddering with stubble, &c. produced from the messuage or land itself, to which the yard belongs; for example, if an acre of land will produce only so much hay, &c. as will maintain but one cow, the occupier shall not put two on the common, because he foddered them in the yard with the produce of other land; for, by the same rule, he might put 1000 of his own, or of other persons, and deprive the other commoners of the benefit of common."

Trespass for empounding plaintiff's colt and three fillies^r. Defendant sets out his right to a messuage with the appurtenants, to which the defendant has a right of common belonging in the *loc. in quo*, and that defendant took the cattle damage feasant. Plaintiff replies, that he is possessed of a copyhold messuage in Drayton, and prescribes for a right of common in the *loc. in quo*, for all commonable cattle, levant and couchant, on the said messuage, at all times of the year. Defendant *protestando*, that plaintiff has not such

p 2 R. A.
q Mellor v. Spateman, 1 Saund. 343.
1 Med. 7.

r Fulcher v. Scales, Norfolk Sup.
Ass. 1738. MSS. Serjt. Leed^r.

right, traverses the levancy and couchancy of the beasts taken, and issue thereon. Per Lee C. J. "The *protestando* is not part of the issue, and need not be proved." It appearing by the evidence, that the messuage was only a yard where the horses were foddered, and one acre of orchard, with the produce of which the plaintiff could not maintain the colt and three fillies, and for that reason he foddered them with hay and straw from other land hired by him. Per Lee C. J. "These beasts cannot be levant and couchant on this yard, though they are foddered there, unless they can be foddered with the produce of the messuage, and so it was determined by Lord Raymond in *Rogers v. Benstead* at Cambr. 1727, after much consideration, that levancy and couchancy signify what the produce of the estate will bear, and is a stint of common with respect to other commoners; and I know no difference as to this, whether the common is for the whole year, or for half a year only." Lord Raymond, in the above case, cited 1 Ventr. —. The foddering cattle in a yard is said to be evidence of levancy and couchancy, Salk. 169.; but it must be foddering with the produce of the ground belonging to the messuage. Plaintiff non-suited. N. There may be common appurtenant to a messuage with appurtenants; but not to a messuage only.

In replevin^a the plaintiff prescribed for common for horses by reason of his messuage. The evidence was of a right of common for horses *and sheep*. Raymond C. J. "It has been adjudged, that in replevin this is no variance from the prescription; for the prescription for a common for horses and sheep is a justification of common for the cattle taken." So evidence of a right of common for sheep and cows will support a plea prescribing for common for sheep^t.

In an action on the case against defendant, plaintiff declared^u, that he was possessed of a messuage to which a right of common for all commonable cattle was appurtenant, and that defendant put his cattle on the said common, and also dug up part of it; *per quod*, the plaintiff could not enjoy his common *in tam amplo modo*, as by law he might. As to putting in his cattle, plea, not guilty; and, as to digging up the common, justification, that it was to make a watering place necessary for drink for the cattle on the common. On the first issue, it was insisted, for the

^a *Coney v. Verden*, Norfolk Sum. Ass. 1727. Serjt. Leed's, MS.

^u *Bennet v. Spinke*, Norfolk Sum. Ass. 3 G. 2. Serjt. Leed's, MS.

^t *Bridges v. Saer*, 4 Mod. 89.

plaintiff, that the defendant could not give in evidence his right of common, on Lord Holt's opinion in *Salk*. But, *per Pengelly C. B.* "In trespass *vi et armis* the only evidence of defendant, on not guilty, is, that he did not come on the ground, and a right to do so must be pleaded. But here the whole declaration is in issue, and so the *per quod* he could not enjoy *in tam amplo modo*, as of right he ought, is part of the issue; and if defendant proves that he has a right, then, notwithstanding the plaintiff's complaint, he does enjoy, &c. as of right he ought. This point was settled by the Court of C. B. in a case I argued, which came before the court on a motion for a new trial, in a cause tried at Cambridge before the present *Ld. Chr. King*, when C. J. of C. B. who had ruled that the defendant could not give in evidence his right of common; and on a motion for a new trial, Tracey J. seemed surprised at it; and it was ruled otherwise by the court, and a new trial granted."

C H A P. XII.

CONSEQUENTIAL DAMAGES.

Of Actions on the Case for consequential Damages, and herein of the general Rule for distinguishing Actions of Trespass vi et armis from Actions of Trespass on the Case.

A QUESTION frequently arises respecting the form of actions, which should be adopted by a person who has sustained an injury; that is, whether the proper remedy is by action of trespass *vi et armis*, or trespass on the case: and, as, in order to avoid confusion, the judges have at all times been anxious that the boundaries of actions should be preserved^a, it may be proper to remark, that the true distinction, (and which seems to be now settled^b), is, that *if the injury be occasioned by the act of the defendant at the time, or the defendant be the immediate cause of the injury, trespass vi et armis is the proper remedy; (1) but where the injury is not direct and immediate on the act done, but consequential only, there the remedy is by action on the case^c*, sometimes termed an action on the case for consequential damages.

The following case will illustrate the rule here laid down:
On the evening of the fair day at Milborn Port in Somer-

^a 3 Wils. 411. 1 Bos. & Pul. 476.

^b Leame v. Bray, 3 East's R. 593.

^c Reynolds v. Clark, Lord Raym. 1399.
Str. 634. S. C. See also Morgan v.

Hughes, 2 T. R. 231. and Kenyon C. J. in Day v. Edwards, 5 T. R. 649. S. P. and in Ogle v. Barnes, 8 T. R. 190, 1.

(1) "Looking into all the cases from the year book in the 21 H. 7. 28. a. down to the latest decisions on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally, or by misfortune, yet he is answerable in trespass." Per Grose J. in Leame v. Bray, 3 East's R. 600.

setshire^d, the defendant threw a lighted squib from the street into the market-house; the squib fell upon the stall or standing of B.; C. in order to protect himself and the wares of B. from injury, took up the squib, and threw it across the market-house, when it fell upon the standing of D., who to save his wares, threw the squib to another part of the market-house; the squib struck the plaintiff in the face, when the combustible matter bursting, put out one of his eyes: an action of trespass, *vi et armis*, having been brought, it was urged, on the part of the defendant, that it would not lie, and that the proper remedy was an action on the case; a verdict was found for the plaintiff, subject to the opinion of the court, as to the form of the action (2). Nares J. was of opinion that trespass, *vi et armis*, was the proper form of action, the act being illegal at common law from the probable consequence of injury resulting from it, and by stat. 9 & 10 W. 3. c. 7. as a nuisance. Blackstone J. was of a different opinion, conceiving that the lawfulness or unlawfulness of the original act was not the true criterion (3); that the settled distinction was, that where the injury was immediate, trespass *vi et armis* would lie; where consequential only, it must be an action on the case. In the present case the original act was as against B. a trespass, not as against C. or the plaintiff. The tortious act was complete when the squib lay at rest upon B.'s stall; B., or

d Scott v. Shepherd, 2 Bl. R. 392. 3 Wils. 403. S. C.

(2) I have stated this case very fully on account of the important doctrine contained in the arguments of the judges, more especially in that of Blackstone J., which is frequently cited on this subject. With respect to the decision of the court in Scott v. Shepherd, it is to be observed, that Lord Ellenborough C. J. (in Leame v. Bray, 3 East's R. 596.) said, that it went to the limit of the law.

(3) So Lawrence J. "In actions of trespass the distinction has not turned either on the lawfulness of the act, whence the injury happened, or the design of the party doing it to commit an injury; but, as mentioned by Blackstone J. in the case of Scott v. Shepherd, on the difference between injuries *direct and immediate*, or *mediate and consequential*; in the one instance the remedy is by trespass, in the other by case." 3 East, 601. "If one turning round suddenly were to knock another down, whom he did not see, without intending it, no doubt the action must be trespass." Per Lawrence J. 3 East, 597. "Where a man shoots an arrow at a mark and wounds another, although it be against his will, he shall be called a trespasser." Per Read C. J. of the Common Pleas, 21 H. 7. 28. a.

any by-stander, had a right to protect himself by removing the squib, but should have taken care to do it in such a manner as not to endamage others. He added, that this was not like the case of diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree, because in those cases the original motion, the *vis impressa*, was continued, though diverted; but here the instrument of mischief was at rest, until a new impetus and a new direction was given to it, not once only but by two rational agents successively; that, in strictness of law, trespass *vi et armis* would lie against D. the immediate actor; for inevitable necessity only would excuse a trespass, and D. had exceeded the bounds of self-defence, and had not used sufficient circumspection in the act of removing the danger from himself; throwing the squib *across* the market-house, instead of brushing it down or throwing it out of the open sides into the street, was an unnecessary and incautious act. Gould J. was of opinion that trespass *vi et armis* was maintainable, that the defendant might be considered in the same light as if *he* had thrown the squib in the plaintiff's face. The terror impressed on C. and D. excited self-defence, and deprived them of the power of recollection; what they did was therefore the inevitable consequence of the defendant's unlawful act; they acted from necessity, and the defendant imposed that necessity on them. De Grey C. J. was of the same opinion, agreeing with Blackstone J. as to the principles he had laid down, but differing from him in the application of those principles to the present case. The question was whether the injury was received by the plaintiff *by force* from the defendant, or whether the injury resulted from a new force of another. He considered all that was done, subsequently to the original throwing, as a continuation of the first force, and the first act, which would continue until the squib was spent by bursting. Any innocent person was justifiable in removing the danger from himself to another; the blame lighted on the first thrower; the new direction and new force flowed out of the first force, and was not a new trespass; C. and D. were not free agents, but acting under a compulsive necessity for their own safety and self-preservation. The several acts of throwing the squib must be considered as one single act, namely, the act of the defendant; the same as if it had been a cracker which had bounded and rebounded again and again before it struck out the plaintiff's eye.

The distinction between trespass *vi et armis*^e, and trespass

^e Per Fortescue J. 1 Str. 636. cited by Kenyon C. J. in *Day v. Edwards*,

5 T. R. 649. Per Le Blanc J. in *Leame v. Bray*, 3 East's R. 602.

on the case, may be further illustrated by the example usually put of a man's throwing a log into the common high-way ; if at the time of the log being thrown it should strike any person, such person may maintain trespass *vi et armis* ; but, if, after it is thrown, and is lodged on the ground, any person passing along the high-way, should receive any injury by falling against or over it, there the remedy is by action on the case.

The defendant driving his carriage on the wrong side of a road^f (which was wide enough to admit of two carriages to pass conveniently) by accident drove against the plaintiff's curricule, the night being so dark that the parties could not see each other ; it was holden, that the injury, which the plaintiff had sustained, having been immediate from the act of driving by the defendant, the proper remedy was trespass, *vi et armis* (4). But, as was truly observed by Le Blanc J. if the defendant had simply placed his carriage in

^f Leame v. Bray, 3 East's R. 593.

(4) " The true criterion seems to be according to what Lord C. J. de Grey says, in *Scott v. Shepherd*, whether the plaintiff received an injury *by force* from the defendant. If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis*, according to all the cases both ancient and modern. It is immaterial whether the injury be wilful or not." Per Lord Ellenborough C. J. 3 East's R. 599. It was observed by Le Blanc J. that " in actions for running down vessels at sea, difficulties may occur, because the *force* which occasions the injury is not so immediate from the act of the person steering. The immediate agents of the force are the wind and waves, and the personal act of the party rather consists in putting the vessel in the way to be so acted upon." In *Ogle v. Barnes and another*, 8 T. R. 188. where an action on the case was brought, and the declaration alleged negligence and unskillfulness in the defendant's management of a ship, by reason whereof she ran foul of the plaintiff's with great force and violence. On motion in arrest of judgment after verdict for the plaintiff, on the ground of the action having been *case* when it ought to have been *trespass*, Grose J. said, that the jury having found a verdict for the plaintiff, they must consider that the complaint set forth in the declaration was proved ; and for such an injury an action on the case was the proper remedy. Lawrence J. observed, that the negligent and improvident management of the defendant's ship did not imply that any act was done by them : after having been guilty of the negligence which led to the mischief, they might have done every thing in their power to avoid the mischief, and then the running against

the road, and the plaintiff had run against it in the dark, the injury would not have been direct, but in consequence only of the defendant's previous improper act; and then the proper form of action would have been that of an action on the case.

The plaintiff declared against the defendant, for driving his cart against the plaintiff's horse with force and violence^g, alleging it to have been done, "by and through the mere negligence, inattention, and want of proper care," of the defendant. On demurrer to this declaration, as not being in trespass, it was holden that it was good. Sir James Mansfield C. J. observed, at the close of the decision, that it was not to be considered that the case of *Leame v. Bray* was overturned by the present; at the same time he might say thus much, that upon a proper case it might be fit that the decision of the court of King's Bench, in *Leame v. Bray*, should be reconsidered. In an action of *trespass*^h where the plaintiff declared that the defendant with force and arms drove a vessel, whereof the said defendant was the commander, against and over a certain boat of the plaintiff, and sunk her, *damno, &c. contra pacem, &c.*; it appeared, that the defendant was master and owner of the vessel by which the injury to the plaintiff's boat was committed; but that he, though on board at the time, did not give the order which caused the accident, but the pilot did; that it was nine o'clock at night in the month of September when the accident happened; that the vessel would not obey her rudder; and that it was owing to no design or wilful act of any person on board. Sir J. Mansfield C. J. left it to the jury to say whether the accident was owing to the mere force of the wind, or to negligence. The jury were of opinion that the accident arose from negligence, and gave a verdict for the plaintiff. On motion to set aside this verdict and enter a nonsuit, on the ground that the action should have been an action on the case, and not trespass, the court were of opinion, that trespass could not be maintained against the defendant; and said the case differed from the preceding case of *Leame v. Bray*, because here the defendant, though on board the vessel, did not give the order which occasioned the accident, but the pilot did; whereas, in *Leame v. Bray*, the defendant

^g *Rogers v. Lumbleton*, 2 Bos. & Pul. N. R. 117. ^h *Huggett v. Montgomery*, 2 N. R. 446.

the plaintiff's vessel might have been owing to the wind and tide. See further on this point, *Turner v. Hawkins*, 1 Bos. & Pul. 472.

was driving the carriage which injured the plaintiff's carriage. The court at the same time intimated doubts as to the authority of *Leame v. Bray*, and *Chambre J.* observed, that in cases of this kind it would be difficult to sustain the proposition, that a master could be liable to an action of trespass for a negligent act done by his servant in the course of his employment, for which the servant himself would also be liable in that form of action.

In a subsequent case of *Covell v. Laming*, 1 Camp. N. P. C. 497. which was *trespass* for running defendant's ship against plaintiff's, it appeared, that at the time of the accident, the defendant was on board his ship, at the helm, but that there was a desire on the part of the defendant to steer clear of the plaintiff, and that the accident was to be ascribed to the mere unskilfulness of the defendant. It was contended, that as the act was not wilful, an action on the case was the proper remedy; but, per Lord Ellenborough C. J. "Whether the injury complained of arises directly, or follows consequentially, from the act of the defendant, I consider, as the only just and intelligible criterion of trespass and case, it makes no difference, that here the parties were sailing on ship board. The defendant was at the helm, and guided the motions of his vessel. The winds and the waves were only instrumental in carrying her along in the direction which he communicated. The force, therefore, proceeded from him, and the injury which the plaintiff sustained was the immediate effect of that force."

In like manner, if the occupier of a houseⁱ, who has a right to have the rain fall from the eaves of it upon the land of another person, fixes a spout, whereby the rain is discharged in a body upon the land, the proper form of action, by the owner of the land against the occupier of the house for this injury, is an action on the case; because the flowing of the water, which constitutes the injury, is not the immediate act of the occupier of the house, but the consequence only of his act, viz. the fixing the spout.

In an action upon the case, the declaration stated, that the plaintiff was master of a ship^k, which was laden with corn, ready to sail, and that the defendant seized the ship and detained her, *per quod querens impeditus et obstructus fuit in viagio*: An exception was taken to the action, on the ground that it should have been trespass *vi et armis*; and 4 Edw. 3. 24. 13 H. 7. 26. and Palm. 47. were cited;

ⁱ *Reynolds v. Clarke*, Lord Raym. 1399. Str. 634. S. C.

^k *Pitts v. Gaince*, Salk. 10. Lord Raym. 559. S. C.

Holt C. J. observed, that, in the cases cited, the plaintiff had a property in the thing taken, but here the ship was not the master's but the owners'. The master declared only as a particular officer, and could recover for his particular loss. He admitted, however, that the master might have brought trespass, and declared upon his possession, which was sufficient to maintain that action.

So where the plaintiff declared¹, that he exercised the trade of a wheeler, and was possessed of several tools that related to the trade, viz. an axe, &c. and being so possessed gained a livelihood, &c. and by the licence of the defendant deposited the tools in defendant's house, who had detained them two months after request, whereby the plaintiff had lost the benefit of his trade. After verdict, a motion was made in arrest of judgment, on the ground, that the plaintiff ought to have brought detinue or trover; but the court held the action well brought; for, if the fact was that the plaintiff had the goods again, detinue was not proper; and though a detainer upon request was evidence of a conversion, yet it was not a conversion; and the damages which he demands in this case being special, the action ought to be special.

So where the plaintiff declared², that he was possessed of a close of land and a decoy pond, to which wild fowl used to resort, and the plaintiff at his own costs had procured decoy ducks, nets, and other engines, for decoying and taking the wild fowl, and enjoyed the benefit in taking them; yet the defendant, intending to injure plaintiff in his decoy, and to drive away the wild fowl, and deprive him of his profit, discharged guns against the decoy pond, whereby the wild fowl were frightened away, and forsook the pond. Upon not guilty pleaded, a verdict was found for the plaintiff, and 20*l.* damages. On motion in arrest of judgment, Holt C. J. observed, that the action was maintainable; that although it was new in its instance, yet it was not new, either in the reason or principle of it. For, 1st. the using or taking a decoy was lawful; 2ndly. this employment of his ground to that use was profitable to the plaintiff, as was the skill and management of that employment. As to the first, every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be

¹ Kettle v. Hunt, Bull. N. P. 78.
² Keeble v. Hickeringill, 11 East, 574.
 n. from Holt's MS. Holt's Rep. 14.
 17. 19. 11 Mod. 74. 120. 3 Salk. 9.

Bull. N. P. 79. S. C. cited in Car-
 rington v. Taylor, 11 East, 574. and
 2 Camp. N. P. C. 258. S. C.

taken, is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wild fowl or tame cattle. Then when a man useth his art or his skill to take them, to sell and dispose of for his profit, this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. The C. J. added, that it had been objected, that the nature of the wild fowl was not stated; but this was not necessary; for the action was not brought to recover damage for the loss of the fowl, but for the disturbance.

In a special action on the case^a, the declaration stated, that plaintiff's wife, unlawfully and against his consent, went away from him, and continued apart from him a long time, and that, during her absence, a large estate, real and personal, having been devised for her separate use, she thereupon was desirous of being reconciled and of cohabiting with plaintiff, her husband; but that the defendant persuaded and enticed her to continue apart from the plaintiff, which she accordingly did until her death; *whereby the plaintiff lost the comfort and society of his wife, and her assistance in his domestic affairs, and the profit and advantage of her fortune.* After verdict for the plaintiff, with 3,000*l.* damages, on motion in arrest of judgment, it was objected, that there was not any precedent of any such action as this. Litt. s. 108. and 1 Inst. 81. b. were cited; but Willes C. J. said, that the general rule there mentioned was not applicable to the present case; that it would have been so, if there had never been any special action on the case before; that this form of action was introduced for this reason, that the law would never suffer an injury and a damage without a remedy; but that there must be new facts in every special action on the case (5).

^a *Wiusmore v. Greenbank*, Willes, 577.

(5) See *Ashby v. White*, Lord Raym. 957. *Pasley v. Freeman*, 2 T. R. 51. and *Chapman v. Pickersgill*, 2 Wils. 146. which last case was an action on the case for falsely and maliciously suing out a commission of bankrupt against the plaintiff; Pratt C. J. (in answer to the objection of novelty,) said, that this was urged in *Ashby v. White*, but he did not wish ever to hear it again; that this was an action for a tort; torts were infinitely various, not limited or confined; for there was not any thing in nature which might not be converted into an instrument of mischief, and this of suing out a commission of bankrupt falsely and maliciously was of the most injurious consequence in a trading country. Durnford's note, Willes, 581. See also Hargrave's Co. Lit. 81. b. n. (2).

C H A P. XIII.

COVENANT.

- I. *Of the Action for Breach of Covenant.*
- II. *Of the Exposition of Covenants.*
- III. *Of the different Kinds of Covenants,*
 1. *Express, and herein of express Covenants running with the Land.*
 2. *Implied.*
 3. *Joint and Several.*
 4. *Void and Illegal.*
 5. *Not to assign without Licence.*
 6. *For quiet Enjoyment.*
- IV. *By whom the Action of Covenant may be maintained,*
 1. *Heir.*
 2. *Executor.*
 3. *Assignee.*
- V. *Against whom the Action of Covenant may be maintained,*
 1. *Heir.*
 2. *Executor.*
 3. *Assignee.*
- VI. *Of the Declaration, and herein of dependent Covenants, Conditions precedent, and independent Covenants.*
- VII. *Of the Pleadings,*
 1. *Accord and Satisfaction.*
 2. *Eviction.*
 3. *Infancy.*
 4. *Levied by Distress.*
 5. *Nil habuit in tenementis.*

6. *Non est factum.*

7. *Non infregit conventionem.*

8. *Performance.*

9. *Release.*

10. *Set-off.*

VIII. *Payment of Money into Court.*

IX. *Evidence.*

X. *Judgment.*

I. Of the Action for Breach of Covenant.

COVENANTS are of two kinds,

1. Express.

2. Implied, or covenants in law.

An express covenant is an agreement entered into, by deed indented or deed poll, between two or more persons, for the performance of certain acts, or for the forbearance to do certain acts.

An implied covenant, or covenant in law, is an agreement, raised by implication of law between two or more persons, in a deed indented or deed poll, from certain technical expressions used therein.

For the violation of agreements of this kind (1) the law has provided a remedy by action of covenant, wherein the party injured may recover damages (2) in proportion to the loss sustained.

A party bringing covenant on a deed poll must be named

(1) In F. N. B. 4to. Ed. 343. A. it is said that in London a man shall have a writ of covenant without a deed, for covenant broken, and it is so said by Vavasor, Serj. in 22 Edw. 4. 2. a. cited in Comyn's Dig. London, N. 1. who refers to Priv. Lon. 149. in support of the same position.

(2) Where it is necessary to enforce the performance of any agreement in specie, as the conveyance of land, execution of deeds, &c. or what is termed a specific performance, application must be made to a court of equity; for in the action of covenant damages only for the non-performance can be recovered.

therein^a; for, where, upon oyer of the deed poll, it appeared, that the defendant promised to do a certain act; without saying, that he promised the plaintiff, it was holden that an action would not lie.

Covenant will lie on letters patent, although there is not any counterpart sealed by the lessee, who is to be charged^b.

If A., for a valuable consideration, promises, by deed, not to do a certain act, an action of covenant may be maintained for the breach of such promise; but an action on the case will not lie:

As where A. recovered a debt against B., and B. paid the condemnation money to A.^c, whereupon A., by deed, released all actions, executions, &c. to B., and in the same deed promised to discharge all executions against B. upon the same judgment, and afterwards sued out execution thereon: the court were of opinion, that the promise being by deed, B.'s remedy was by an action of covenant, and not an assumpsit (3).

^a Green v. Horae, Salk. 197. Comb. 219. S. C.

^b Bret v. Cumberland, Cro. Jac. 397. 521. fully stated post. 418.

^c Bensus v. Gnyldley, B. R. M. 16 Jac. Cro. Jac. 505. S. C. & S. P. by the name of Bemishe v. Hildersley, said to have been adjudged, 1 R. A. 517. (A.) pl. 2.

(3) Although it is a general rule that assumpsit will not lie, where there is a remedy of a higher nature^{*}, yet there are some exceptions to this rule; as where two persons entered into articles of partnership for a term of years, and the deed contained a covenant to account yearly, and to adjust and make a final settlement at the expiration of the partnership; and they dissolved the partnership before the years were expired, and accounted together, and struck a balance, which was in favour of the plaintiff, including several items not connected with the partnership, and the defendant promised to pay it; it was holden, that assumpsit would lie on such express promise. And Buller J. observed, that if no other articles had been introduced into the account, but those relating to the partnership, he should still have been of opinion, that assumpsit might have been maintained; for the question then would have been, whether a previous partnership being dissolved, and an account settled, was or was not, in point of law, a sufficient consideration for a promise. He had no difficulty in saying, that it was. Foster v. Allanson, 2 T. R. 479. A stronger exception, however, to the general rule above-mentioned will be found in the case of Nurse v. Craig, ante p. 248.

^{*} Bulstrode v. Gilburn, Str. 1027.

An action of covenant is not within the stat. 3 W. & M. c. 14^d. which makes the devisee chargeable jointly with the heir for the debts of his testator in respect of lands devised to him: the remedy there given is confined to the action of debt.

II. *Of the Exposition of Covenants.*

COVENANTS are to be construed according to the obvious intention of the parties^d, as collected from the whole context of the instrument, *ex antecedentibus et consequentibus*, and according to the reasonable sense of the words. If there be any ambiguity, then such construction shall be made as is most strong against the covenantor (4); for he might have expressed himself more clearly (5).

It is immaterial in what part of a deed any particular covenant is inserted^e; for, in the construction of it, the whole deed must be taken into consideration, in order to discover the meaning of the parties; as where, in an indenture of lease of a colliery^f, two lessees covenanted *jointly and severally in manner following*, viz. &c. here followed a number of covenants in respect to working of the colliery, wherein the lessees covenanted jointly and severally; then followed a covenant, that the monies appearing to be due should be accounted for and paid by the lessees, their executors, &c. (not saying, "and each of them"); it was holden by the court (*absente* Kenyon C. J.) that the general words, at the beginning of the covenants by the lessees,

^d Wilson v. Knubley, 7 East, 128.

^f Per Buller J. 5 T. R. 526.

^e Plowd. 329. cited by Ellenborough C. J. Iggulden v. May, 7 East, 241.

^g D. of Northumberland v. Ward Erington, 5 T. R. 523.

(4) See the opinion of Sir J. Mansfield C. J. in Flint v. Brandon, 1 Bos. and Pul. N. R. 78.

(5) In like manner, where the words of the grant are doubtful, they are to be construed in favour of the grantee. This general principle has been applied to the construction of leases; hence it has been holden, that under a lease for fourteen or seven years, *the lessee only* has the option of determining it at the end of the first seven years. Doe d. Webb v. Dixon, 9 East, 15. in which the authority of Dana v. Spurrier, 3 Bos. & Pul. 399. 442. was recognized.

“jointly and severally, &c. in manner following,” according to the general rules of construction, extended to all the subsequent covenants on the part of the lessees throughout the deed, there not being any thing in the nature of the subject to restrain those words to the former part of the lease.

In conformity to the rules before laid down for the construction of covenants, and in support of the apparent intention of the parties, covenants in large and general terms have been frequently narrowed and confined:

As where A. leased a manor to B. for years, excepting all woods, great trees, timber trees, and underwood^b, &c. and covenanted with the lessee, that he might take fire-boot, *super dicta præmissa*, it was holden, that the lessee could not take fire-boot in a close of wood parcel of the manor, because, by the exception of the wood, the soil thereof was excepted; and the words *super præmissa* should be intended of such things only as were demised. It was admitted, however, that, by the covenant, the lessee was entitled to take the wood upon the other lands, for though the wood was excepted, yet the land was demised.

The defendant sold the plaintiff a lease¹ for years of a manor, and entered into a bond, with a condition that *he would not do, nor had done*, any act to disturb the plaintiff, *but* that the plaintiff should hold and enjoy without the disturbance of the vendor, *or any other person*; it was holden, that the condition was confined to acts done or to be done by the vendor, on the ground of the latter words being referrible to the former.

So where in covenant against the executors of J. W.^k, the declaration stated, that J. W., by indenture, granted land, &c. to the plaintiff in fee, and warranted the land, &c. *against himself and his heirs*, and covenanted that he was, *notwithstanding any act by him done to the contrary*, lawfully and absolutely seised in fee simple, *and that he had a good right, full power, and lawful and absolute authority to convey*; and assigned a breach, that J. W. *had not* at the time of making the said indenture, nor at any time before or since, good right, full power, and lawful and absolute authority to convey or assure the premises to the plaintiff in manner aforesaid. The defendants prayed oyer of the indenture,

^b *Cage v. Paxlin*, 1 Leon. 116. cited by Ellenborough C. J. 7 East, 241.

¹ *Broughton v. Conway*, Moer, 58.

cited by Lord Ellenborough C. J. in *Gale v. Reed*, 8 East, 89.

^k *Browning v. Wright*, 2 Bos. & Pul. 13.

(by which it appeared that J. W. covenanted for himself, his heirs, executors, and administrators, to make a cartway, and that the plaintiffs should quietly enjoy without interruption from himself, or any person claiming under him, and lastly, that he, his heirs, or assigns, and all persons claiming under him, should make further assurance,) and then demurred: (after argument), it was holden, that the words "that he had a good right, full power, and lawful and absolute authority to convey," were either part of the preceding special covenant "that he was notwithstanding any act by him done to the contrary, lawfully and absolutely seised in fee;" or, if not, that they were qualified and restrained by all the other special covenants *to the acts of himself and his heirs*.

But where releasors covenanted¹, that, notwithstanding any act, &c. by them done to the contrary, they were seised of the land in fee; *and also*, that they, notwithstanding any such matter or thing as aforesaid, had good right to grant the premises; *and likewise*, that the releasee should quietly enjoy the same without the lawful let or disturbance of the releasors, or their heirs or assigns, *or for or by any other person*; and that the releasee should be indemnified by the releasors and their heirs against all other titles, charges and incumbrances, except the chief rent payable to the lord of the fee; it was holden, that the general words of the covenant *for quiet enjoyment*, were not, in necessary construction, to be restrained by the language of the antecedent covenants *for title and right to convey*; although those antecedent covenants were certainly covenants of a limited kind, and provided only against the acts of the releasors; Lord Ellenborough C. J. (who delivered the opinion of the court) observing, "that the covenant *for title*, and the covenant *for right to convey*, are indeed what is somewhat improperly called synonymous covenants; they are however connected covenants, generally of the same import and effect, and directed to one and the same object; and the qualifying language of the one may therefore properly enough be considered as virtually transferred to and included in the other of them. But the covenant for quiet enjoyment is of a materially different import, and directed to a distinct object. The covenant for title is an assurance to the purchaser, that the grantor has the very estate in quantity and quality which he purports to convey, viz. in this case an indefeasible estate

¹ Howell v. Richards, 11 East, 633.

in fee simple. The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbances thereupon. For the purpose of this covenant, and the indemnity it affords, it is immaterial in what respects, and by what means, or by whose acts, the eviction of the grantee or his heir takes place: if he be lawfully evicted, the grantor, by such his covenant, stipulates to indemnify him at all events. And it is perfectly consistent with reason and good sense, that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he purports to convey, than for quiet enjoyment. The C. J. added, that he did not find any case in which it is held that the covenant for quiet enjoyment is all one with the covenant for title, or parcel of that covenant, or in necessary construction to be governed by it, otherwise than as, according to the general rules for the construction of deeds, every deed (as was said by Hobart C. J., *Winch. Rep.* 93. *Sir Geo. Trenchard v. Hoskins*) is to be construed according to the "intention of the parties, and the intents ought to be adjudged of the several parts of the deed, as a general issue out of the evidence; and intent ought to be picked out of every part, and not out of one word only." Consistently therefore with that case, and with every other that I am aware of, we are warranted in giving effect to the general words of the covenant for quiet enjoyment; and which are entitled to more weight in this case, inasmuch as they immediately follow and enlarge the special words of covenant against disturbance by the grantors themselves: and to restrain the generality of these words, thus immediately preceded by express words of a narrower import, would be a much stronger thing than to restrain words of like generality by an implied qualification arising out of another covenant where no such general words occurred. The person using the general words, could not forget that he had immediately before used special words of a narrower extent. If the covenant containing both the special and general words stood by itself, there would be no pretence for refusing effect to the larger words; and if this could not be done in favour of express words of a narrower import in the same covenant, I cannot possibly understand upon what ground it should be done in favour of implied words of narrower import which occur in another separate covenant, addressed, as has been before said, to a distinct object."

Where A. by indenture^m, in consideration of a certain

^m *Iggulden v. May*, 7 East, 237. affirmed on error in Exch. Chr. 2 N. R. 449.

sum, in nature of a fine, and of a yearly rent, demised land for 21 years, and covenanted at the end of 18 years of the term, or before, on request of the lessee to grant a new lease of the premises "for the like fine, for the like term of 21 years, at the like yearly rent, with *all* covenants as in that indenture were contained;" it was holden, that this covenant was satisfied by a tender of a new lease for 21 years, containing *all* the former covenants, except the covenant for future renewal.

In covenant^a, the plaintiff declared upon an indenture, whereby the defendant demised to the plaintiff for a term of years, certain parts of a messuage then lately parted off from the part occupied by the defendant, with certain easements belonging to the same, and a portion of an adjoining yard; and the defendant covenanted that he would permit the lessee (the plaintiff) to have the use of the pump in the said yard jointly with the defendant, *whilst the same should remain there*, paying half the expenses of keeping it in repair. The plaintiff assigned for breach, that during the continuance of the lease, the defendant, without reasonable cause, and in order to injure the plaintiff, took away the pump, although plaintiff was willing to have paid half the expense of keeping the same in repair. On demurrer it was holden, that the breach was ill-assigned; for the use (6) of the pump was not a specific subject of the demise; and by the introduction of the words, "whilst the same should remain there," it appeared that the lessor meant to reserve himself the liberty of removing the pump, from whatever capricious or unreasonable motive he might do so; and that it was not inconsistent with the stipulation, that the lessee should pay half the expenses of repair, whilst the pump remained on the demised premises.

^a Rhodes v. Bullard, 7 East, 116.

(6) The demise of the use of a thing is the demise of the thing itself. Pomfret v. Ricraft, 1 Saund. 321.

III, Of the different Kinds of Covenants,

1. *Express, and herein of express Covenants running with the Land.*
2. *Implied.*
3. *Joint and Several.*
4. *Void or Illegal.*
5. *Not to assign without Licence,*
6. *For quiet Enjoyment.*

I. Of Express Covenants, and herein of express Covenants running with the Land.

THERE is not any precise form of words necessary to constitute an express covenant^o; any form of words or mode of expression in a deed, which clearly evinces an agreement, will amount to a covenant, for a breach whereof an action of covenant may be maintained:

As if it be *agreed* between A. and B.^p, by deed, that B. shall pay to A. a sum of money for his lands on a certain day; these words amount to a covenant by A. to convey the lands to B. on that day.

So if lessee for years covenant to repair^q, “provided always, and it is *agreed*, that the lessor shall find great timber;” this word *agreed* will make a covenant on the part of the lessor to find great timber. Secus, if the word *agreed* had been omitted^r.

So if A. lease to B., on *condition*^s that he shall acquit the lessor of charges, ordinary and extraordinary, and shall keep and leave the houses at the end of the term in as good a plight as he found them; if he does not leave them in good repair, an action of covenant lies.

So where covenant was brought on a writing sealed^t, whereby the defendant’s testator *acknowledged himself to be accountable* to the plaintiff for all such monies as should

^o Moor, 135.

^p Pordage v. Cole, 1 Saund: 319. 1 Lev..

^q 274. T. Raym. 183. S. C.

^r 1 Rol. Abr. 518. (C.) pl. 3.

^r 1 Rol. Abr. 518. (C.) pl. 3.

^s Ib. pl. 5. 40 E. 3. 5. b.

^t Brice v. Carre and others, Executors of J. S. 1 Lev. 47.

be charged by plaintiff on A. *to be paid to B.*; and alleged, that he the plaintiff charged a certain sum of money on A. to be paid to B., and that the defendant's testator had not paid it; it was objected, that covenant did not lie, and that the proper form of action was an action of account; but it was holden, that covenant would lie in this case, and on any words, in a deed, purporting an agreement for the payment of money.

So in the case of a lease for years *rendering* rent^a; it was adjudged, by the court (*absente* Holt C. J.) that the *render* made a covenant.

So where covenant was brought against executrix of assignee of lessee for years^x, by indenture, for rent arrear in the time of the executrix upon the words *yielding and paying*; it was holden, that the action would lie; and the opinion of the court was, that the words "yielding and paying," (7) in the indenture made an express covenant, and were not a bare covenant in law.

So in covenant against the assignee of lessee for years, upon an indenture^y, whereby plaintiff demised to the lessee a house, *excepting a room, with free liberty of passage* through other rooms of the house unto the room excepted. Lessee assigned the lease; and the assignee stopped the passage, whereupon plaintiff brought this action, declaring for a breach of covenant. Resolved, by the court, that this exception amounted to a reservation, upon which covenant would lie; and they compared it to the preceding case of rent reserved, where covenant will lie upon the words of reservation, without any express words of covenant.

^a Giles v. Hooper, Carth. 135.

^x Porter v. Sweetnam, Sty. 406. 481.

^y Bush v. Coles, Carth. 232. Salk. 196. S. C.

(7) These words, *yielding and paying*, have sometimes been considered as sufficient to raise a covenant by implication of law only. See a dictum to this effect, 1 Sidf. 447. and Kenyon C. J. so considered them in Webb v. Russel, 3 T. R. 402. The same opinion is adopted by Serjeant Williams in his notes to the first volume of Saunders, p. 241 b. note 5. But in addition to the authorities in the text, it may be observed, that in Rolle's Abridgment, Covenant (C.) the title of which is "What words will make an express covenant," in pl. 10. p. 519. this case is put as an instance of an express covenant: "If a man lease land for years, reserving a rent, an action of covenant lies for the non-payment of the rent; for the *reddendo* of the rent is an agreement for the payment of the rent, which will make a covenant."

Where the law creates a duty or charge^z, and the party is disabled from performing it, without any default on his part, and has not any remedy over, the law will excuse him; but, where the party, *by his own contract*, imposes on himself a duty or charge, he is bound to make it good, notwithstanding inevitable accident; because he might have provided against it by his own contract (8).

A lease for years was made by indenture^a, of a meadow bounded on one side by a river, and the lessee covenanted to sustain and repair the banks, to prevent the water from overflowing the meadow, upon pain of forfeiture of a sum of money; afterwards, by a sudden and violent flood, the banks were destroyed: and, by the opinion of Fitzherbert and Shelley Js. "the law is, that the lessee is excused from the *penalty, because it is the act of God*, which cannot be resisted; but still he is bound to make and repair the thing in convenient time, *because of his own covenant*."

So where the assignee of a reversion brought covenant against lessee of a house for non-payment of a year's rent^b; defendant prayed oyer of the lease, which contained a covenant, on the part of the defendant, *to repair the house during the term, except it should be destroyed by fire*, and then pleaded, that before any part of the rent in question became due, the premises were destroyed by fire, against the will of defendant, and were not re-built by the lessor or the plaintiff; and that the defendant did not occupy the premises during the year for which the rent was claimed. On demurrer, it was holden, on the authority of *Paradine*

^z *Paradine v. Jane*, Aleyn, 27.

^a *Dyer*, 33 a. E. 28 & 29 H. 8. C. B.

^b *Monk v. Cooper*, E. 13 G. B. R. Str. 763. & Ld. Raym. 1477. S. C.

(8) This rule, extracted from the case of *Paradine v. Jane*, has been recognized in many subsequent cases*; and in *Beale v. Thompson*, C. B. E. 43 Geo. 3. 3 Bos. & Pul. 420. *Chambre J.* speaking of this case says, "the court took a rational distinction, that where an obligation is imposed by rule of law, and there is not any express covenant, the law introduces a reasonable exception, viz. that an act of irresistible violence will excuse the party; but if a party enter into an absolute contract, without any qualification or exception, and receives from the party, with whom he contracts, the consideration for such engagement, he must abide by the contract, and either do the act, or pay damages, his liability arising from his own direct and positive undertaking."

* *Atkinson v. Ritchie*, B. R. H. 49 G. 3.

v. Jane, Aleyn, 27. that the defendant was bound by his express covenant to pay the rent during the term^c.

The doctrine laid down in the preceding case having been alluded to in argument in *Cutter v. Powell*, 6 T. R. 323. Lord Kenyon C. J. said, "that it must be taken with some qualification; for where an action was brought for rent after the house was burned down, and the tenant applied to the Court of Chancery for an injunction; Lord Northington said, "that if the tenant would give up his lease, he should not be bound to pay the rent." Probably the case here alluded to by Lord Kenyon was the first of the following cases:

The plaintiffs were tenants to the defendants of a house^d, &c. by lease, in which there was a covenant by the plaintiffs to do all repairs, accident by fire only excepted: the defendants had insured the buildings, which were burned down; the insurers paid the loss: the defendants declined rebuilding, and brought an action of covenant for the rent accrued due after the accident had happened. The plaintiffs filed a bill in the Court of Chancery for an injunction, and obtained the common injunction: the defendants on coming in of the answer, moved to dissolve the injunction, they having by their answer offered to remit the rent, upon a surrender being made of the lease, which the plaintiffs declined, as the lease was beneficial. The plaintiffs had pleaded at law the truth of the case in bar of the action: and on a demurrer to this plea, the plaintiffs were advised not to argue the demurrer, but to apply to a court of equity. On shewing cause against dissolving the injunction, Lord Northington Chr. inclined to think, that the matter pleaded was a good defence at law, but that, in all events, a court of equity ought to restrain this action, until the house, &c. were rebuilt; and therefore continued the injunction.

Bill brought for a specific performance of a covenant^e for quiet enjoyment contained in a lease of certain houses demised by defendant to plaintiff, and to have 500*l*. laid out in rebuilding the houses, (which had been burned down by accident since the execution of the lease) and for an injunction to restrain defendant from proceeding at law. N. The 500*l*. had been received by the defendant from the insurance office on account of the insurance of these houses.

c See *Belfour v. Weston*, 1 T. R. 310. S. P.

d *Camden and another v. Morton and another*, in *Canc. E. 4 G. 3. MSS.*

e *Brown v. Quilter*, in *Canc. 1 Jano, 1764, MSS. Amb. 619. S. C.*

Defendant, by his answer, offered to accept a surrender of the lease.

Lord Northington Ch. "There is not any covenant from the landlord to rebuild. A court of equity can decree a specific performance in those cases only, where clear directions can be given in what manner, and when the act is to be performed. It would be most arbitrary for me to decree a rebuilding in a case, where there is not any covenant for the rebuilding. All that can be required from a court of equity is, in a case like this, when an action shall be brought for rent, to order an injunction, until the houses are rebuilt, or the lease delivered up. In the present case, there has not been any action brought for the rent, and the defendant has offered to accept a surrender of the lease, which is all the relief the plaintiff is entitled to." There being a valuable wharf on the demised estate, the plaintiff declined surrendering his lease; the bill therefore was dismissed with costs (9).

The lessee of a house on a general covenant to repair during the term, is bound to rebuild, in case the house be consumed by an accidental fire^f (10). So on a covenant to erect a bridge in a substantial manner, and to uphold and keep in complete repair for a certain time; although the

^f *E. of Chesterfield v. D. of Bolton*, Com. R. 637. *Bullock v. Dommit*, 6 T. R. 650. S. P.

(9) Ejectment by tenant against landlord to recover the possession of some houses which had been burned down during the term, and had been rebuilt by the landlord. In the lease there was an express covenant, on the part of the tenant to pay the rent, but he had not paid any after the time of the fire. Lord Mansfield C. J. said, the consequence of the houses being burned down was, that the tenant was not obliged to rebuild, but the tenant was obliged to pay the rent during the whole term. The houses having been burned down four years before action brought, and the rent not having been paid during that period, he left it to the jury to consider whether it was not to be presumed, that the tenant had abandoned the lease at the time of the fire; and accordingly the jury found a verdict for the defendant. *Pindar v. Ainsley*, Middlesex Sittings after M. T. 1767. cited by Buller J. 1 T. R. 312.

(10) In many cases an exception of accidents by fire or tempest is introduced into leases for the protection of lessees. It appears from the case of *Monk v. Cooper*, that this exception should be introduced into the covenant for payment of the rent, as well as into the covenant for repairs, in order to exempt the lessee from

bridge be broken down by an extraordinary flood, yet the party covenanting is bound to repair^g. See *Shubrick v. Salmon*, 3 Burr. 1637. to the same effect.

Of express Covenants running with the Land.—Express covenants, which run with the land, entered into by lessee for years for himself, his executors, administrators, and assigns, are binding on the lessee and his personal representative (having assets) during the continuance of the term; although such covenants are broken, after an assignment of the term by the lessee, and after an acceptance of rent from the assignee by the lessor, or grantee of the reversion; and there is not any distinction in this respect between a voluntary assignment by the lessee and a compulsory assignment by virtue of the bankrupt laws^h.

In covenant against lessee of a house by indentureⁱ, wherein the lessee had expressly covenanted for himself, his executors, and assigns, that he would repair within a month after warning; the breach assigned was for not repairing the house within a month after warning given: the defendant pleaded, that a long time before that warning he assigned his term to J. S. who had paid his rent always afterwards to the plaintiff, who had accepted the same; and then averred performance of all the covenants until the assignment; the plaintiff demurred, on the ground that this assignment did not take from the lessor his advantage of the *express* covenant; and, notwithstanding his acceptance of rent, by the hands of the assignee, yet he might charge the lessee or assignee at his election; and the whole court being of that opinion, it was (*without argument*) adjudged for the plaintiff. The same point was ruled in *Ventrice v. Goodcheap*, 1 Roll. Abr. 522. N. pl. 1. where the lessee had covenanted for himself and his assigns to repair; on the ground that the lessee had expressly covenanted for himself and his assigns,

^g *Brecknock Company v. Pritchard*, 6 T. R. 750. stat. 49 G. 3. c. 121. s. 19, ante p. 226.

^h *Auriol v. Mills*, 4 T. R. 94. But see ⁱ *Barnard v. Godscall*, Cro. Jac. 309.

the obligation of paying rent as well as rebuilding, in case the house should be destroyed by fire or tempest.

In *Walton v. Waterhouse*, 2 Saund. 420. covenant was brought against lessee of a house for not repairing; defendant pleaded that the house had been destroyed by fire, but in convenient time after had been rebuilt. Plaintiff demurred specially, because defendant did not shew *by whom* the dwelling house was rebuilt.—Judgment for plaintiff.

and that this personal covenant could not be transferred by the acceptance of the rent.

So where the breach was for non-payment of rent^k (11). In *Mayor v. Steward*, 4 Burr. 2439. it was holden, that a bankrupt was bound by an express collateral covenant (to indemnify plaintiff against the covenants of a lease), which had been broken after act of bankruptcy committed, and after defendant had obtained his certificate.

From the foregoing cases it appears clearly, that express covenants, which run with the land, entered into by lessee for years for himself, his executors, administrators, and assigns, are binding on the *lessee* during the continuance of the term, although such covenants are broken after an assignment of the term by the lessee, and after the acceptance of rent from the assignee by the lessor or grantee of the reversion; it remains only to add, that such covenants, under the same circumstances, are binding on the personal representative of the lessee *having assets*.

In covenant by lessor against the executor of lessee for

^k *Devon v. Collier*, 1 Rol. Abr. 522. (N.) pl. 1. *Crofts v. Taylor*, *ibid.* Adj. on dem. S. P.

(11) The following authorities may be referred to as tending to establish the same point. *Fisher v. Ameers*, 1 Brownl. 20.—*Thursby v. Plant*, 1 Sidf. 402.—1 Sidf. 447. *Nota.*—*Boulton v. Cann*, Freem. 337.—*Ashurst v. Mingay*, 2 Show. 134. *T. Jones*, 144. S. C.—*Edwards v. Morgan*, 3 Lev. 233.—*Jodderell v. Cowell*, Ca. Temp. Hardw. 343.—*Auriol v. Mills*, 4 T. R. 94. I am aware of one dictum only in opposition to these authorities, that of *Jerman J.* in *Whitway v. Pinsent*, Sty. 300. who took a distinction between covenants for payment of rent, and covenants to repair, observing, that “if lessee for years assign his term, the lessor having notice thereof, and the lessor accept rent from the assignee, he cannot demand rent of the lessee afterwards; yet he may sue other covenants contained in the lease against him, as for reparations or the like.” It may be remarked that, if an express covenant for payment of rent be a covenant, which runs with the land, (of which there cannot be any doubt; indeed it was so considered by Lord Ellenborough C. J. delivering the opinion of the court in *Stevenson v. Lambard*, 2 East’s R. 580.) all the cases, which have decided, that the obligation imposed on lessee for years, by an express covenant to repair, is not, as far as respects the action of covenant, cancelled by an assignment of the term, and the lessor’s acknowledgment of the assignee as his tenant, are authorities for the same position with respect to express covenants for payment of rent.

years¹, by indenture, of a garden adjoining to the house of the lessor, in which indenture lessee had covenanted for himself, his executors, and assigns, that he would not erect any building in the garden to the prejudice of the lessor's lights; it was alleged that an assignee of defendant's testator had erected an house in the garden to the prejudice of the lessor's lights. Defendant pleaded an assignment of the term to J. S. who had paid rent to the lessor, and had been accepted by him as tenant. On demurrer, it was contended, on the part of the defendant, that by the assignment and acceptance of rent, the privity of contract was determined, more especially as it was a contract which concerned an act to be executed on the land, and therefore running with the land; but the court conceived, that as it was an *express covenant*, that the lessee should not build, it should bind him and his executors; and neither an assignment, nor an acceptance of rent, by the hands of the assignee, could deprive the lessor of the advantage of suing the lessee or his executors on an express covenant. Judgment for plaintiff.

Queen Elizabeth, by letters patent, demised a house for years^m, which the lessee covenanted to repair. On the death of the queen, the reversion descended to King James; when the lessee assigned his term, and the assignee paid rent to the king, who afterwards granted the reversion to the plaintiff; the house being out of repair, the plaintiff brought covenant against the executors of lessee for a breach of the covenant committed after an assignment of the term and reversion, and after plaintiff had accepted rent from the assignee of the term; it was holden, that the action would lie, on the ground that it was a covenant in fact, by the express words, running with the land; and that, notwithstanding an assignment, the covenantor and his executors were always chargeable, so that he could not either by the assignment of his estate, or by any other act, discharge himself or his executors, (who were chargeable by the act of the testator) *having assets*, as long as the reversion continued in the lessor; and by the express words of stat. 32 H. 8. c. 34. such remedy, as the lessor might have had against the lessee or his executors, the assignee shall have against them; *it being a covenant in fact, which runs with the land.*

¹ Bachelour v. Gage, Executor of Gage, B. R. E. 6 Car. Cro. Car. 188. and Sir W. Jones, 223. Arthur v.

Vanderplank, B. R. H. 7 Geo. 2. M. S. P.

m Brett v. Cumberland, B. R. 16 Jac. Cro. Jac. 521.

2. *Of Implied Covenants.*

There are certain words^a, which though of themselves they do not import any express covenant, yet when used in contracts by deed will amount to a covenant:

As if A., by indenture, "*demise and grant*" lands to B.^b for years, and C. enters and evicts B. by rightful title, B. may maintain an action on the implied covenant; and A. is estopped from saying that B. was not in by the lease.

So if lessor demise land for a term of years^c, and afterwards by the words *dedi et dimisi* demises the same land to A. for life, who enters and is ousted by the termor for years, A. may maintain an action against the lessor on the implied covenant, and have satisfaction in damages for the chattel evicted; for he continues seised of the freehold.

In covenant on a lease for years made by the defendant by the word *dimisi*^d, it was averred, that at the time of the lease made, the lessor was not seised of the land, but a stranger; it was objected, that the entry of the lessee by force of the lease, and ejectment by the stranger, or some person claiming under him, were not alleged: but the court was of opinion, that the action would lie; for the breach of covenant was, that the lessor had undertaken to demise that which he could not, the word *dimisi* importing a power of letting, as *dedi* does a power of giving; and they added that it was not reasonable to enforce the lessee to enter upon the land, and so to commit a trespass.

And where a lease for years is made by the word "*demise*",^e the assignee of the lessee is entitled to the same advantage as the lessee, and may in case of eviction maintain an action on the implied covenant.

The implied covenant follows the nature of the interest granted:

As where A. and B. made a lease by the word "*dimise-run*",^f it was holden, that the implied covenant was joint, viz. that A. and B. had a power to demise, and that an action on the ground of their not being seised at the time of the demise should be brought against both, and could not be maintained against one only.

^a 48 Edw. 3. 2. b. 1 Rol. Abr. 519. (F.) ^r Spencer's Case, 5 Co. 17. a. 4th Resolution.
[●] Style v. Hearing, Cro. Jac. 73.
^p Pincombe v. Rudge, Yelv. 139. ^s Coleman v. Sherwyn, Carth. 97.
^q Holder v. Taylor, Hob. 12. 1 Inst. Salk. 137. S. C.
301. b.

The generality of an implied covenant may be qualified and restrained by an express covenant.

As where the lessor *demised and granted* a house for a term of years^t, and covenanted, that the lessee should enjoy the house during the term, *without eviction by the lessor, or any claiming under him*; it was holden, that the express covenant qualified the generality of the covenant raised by implication of law from the words *demise and grant*, and restrained it by the mutual consent of both parties, so that it should not extend further than the express covenant (12). Sir E. Coke, from whose reports this case has been extracted, subjoins as follows: "And there is great reason, that the particular covenant subsequent should qualify the general force of this word 'demise;' for if the force of this should stand, the particular covenant would be in vain—and these words 'demised and granted,' are frequent in every common lease; and the better construction of deeds is to make one part of a deed expound another, and so to make all the parts agree, and, as far as it can be done, according to the true intention and meaning of the parties (13)."

So where in covenant on an indenture^u, whereby the defendant granted a fee farm rent to the plaintiff, which he had purchased of the late trustees for sale of the king's tenements, and covenanted that he was seised in fee, and had good right to sell; the breach assigned was, that he had not good right: the defendant pleaded, that it was further agreed in the same indenture, that all the covenants in the indenture should not extend further than to acts done by the vendor and his heirs, whereon the plaintiff demurred; and although this was a remote agreement at the end of the deed, at a great distance from the other covenant, it was adjudged,

^t Nokes's Case, T. 41 Eliz. B. R. 4 Co. 80. b.

^u Brown v. Brown, 1 Lev. 57.

(12) This case is stated as it is reported in Coke; in Croke's report of the same case, Cro. Eliz. 674. it is said, that Popham C. J. inclined to this opinion, but that the other justices did not deliver any opinion thereon, and that judgment was given on another point; Coke's report, however, is adopted by Hale in *Deering v. Farrington*, 1 Mod. 113. and recognised by Vaughan in *Hayes v. Bickerstaff*, Vaughan, 126.

(13) The doctrine of implied covenants is confined to real property. Hence if *goods* be *demised* for years, and the lessee be evicted, covenant does not lie; for the law does not create a covenant for a personal thing. Com. Dig. Cov. (A. 4.).

that it had qualified the first covenant, and restrained it to acts done by the *covenantor only*; as in Nokes's case. Judgment for defendant. See also *Browning v. Wright*, 2 Bos. & Pul. 18. and ante, p. 407.

3. *Of joint and several Covenants.*

Where the interest (14) of the covenantees is joint, the action of covenant follows the nature of the interest, and must be brought in the names of all the covenantees; and this rule holds, even where the *covenant* is joint and several: (15) as where B.^x by indenture covenanted with C. and D., and to and with E. and F. his wife, (who afterwards became the wife of D.) and their assigns, *and to and with each of them*, that he (B.), at the time of sealing and delivering the indenture, was lawfully and solely seised of a certain rectory; an action was brought by D. and F. his wife, for a breach of the covenant: after verdict and judgment for the plaintiffs in B. R., the judgment was reversed on error in the Exchequer Chamber, upon the ground that, notwithstanding the words "*and to and with each of them*," the other covenantee should have joined in the action (16).

x *Slingsby's Case*, on error, Exchequer Chamber, 5 Rep. 18. b. 3 Leon. 160, 161. S. C.

(14) Where the legal and beneficial interests are not united in the same person, this term is to be understood of the legal interest. See *Anderson v. Martindale*, post p. 423.

(15) For the wording of the covenant cannot make that, which was before joint, several. So on the other hand, where the interest is several, although the *covenant* be joint, yet it shall be taken to be several. Bull. N. P. 157. "Where the covenant is to several, for the performance of several duties to each, the covenant shall be moulded according to the several interests of the parties, and each shall only recover for a breach as far as his own interest extends." Per Kenyon C. J. in *Anderson v. Martindale*, 1 East's R. 501.

(16) When it appears on the face of the declaration, that each of the covenantees is to have a several interest or estate, then the addition of the words "*with each of them*" will make the covenant several in respect of their several interests; as if one by indenture demise Blackacre to A. and Whiteacre to B. and covenant with each of them, that he is lawful owner of both the said acres; then in respect of the several interests, the covenant by those words is made several. 5 Rep. 19. a.

The defendant and one G.^y covenanted for themselves, and for each of them, with the plaintiff and one C. to receive rents due to the plaintiff and C. in Ireland, and also that they and each of them would pay a moiety thereof *to each of them*, the plaintiff and C.; in covenant by plaintiff against defendant alone for the recovery of plaintiff's moiety, the breach assigned was, that although defendant and G. had received 7,000*l.* neither the defendant or G. had paid a moiety to the plaintiff: on motion, in arrest of judgment, it was holden, 1st. that the covenant being to pay a moiety to each, the interest was several, and consequently the action was well brought by the plaintiff alone. 2ndly, that the defendant had covenanted for the acts of his companion, as well as for his own acts, and consequently that the action was well brought against the defendant, and the breach well assigned.

If a lease be granted to A. and B.^s, to commence at a future day, and A. and B. jointly and severally covenant for the performance of certain acts, and A. dies before the day, the covenant being joint and several, will be binding on the executors of A., although the *interesse termini* survive to B.

Where the interest of the covenantees is joint^a, if any of them die, the action must be brought by the survivors, averring the deaths of their companions (17). As where A. by indenture, covenanted with B. and C., that he (A.) would enter into a bond to pay B. a sum of money on a certain day: B. died; B.'s administrator brought covenant; it was adjudged, that it did not lie; for although the money was to be paid to B., who was dead, yet he who survived and was party to the indenture ought to sue; for B. and the survivor make as to this purpose but one person; as if a bond is made to three to pay money to one of them, all ought to join in the suit: for they are all as one obligee: and if he who ought to have the money dies, the survivors must sue; although they have not any interest in the sum contained in the condition: so in this case, the money payable to B., in his life-time, being to be obtained by suit on

^y Lilly v. Hodges, 8 Mod. 166. Str. 553. S. C. ^a Rolls v. Yate, Yelv. 177. 1 Bulstr. 25, 6. S. C. Judgment affirmed on error.

^z Enys v. Donithorn, 2 Burr. 1190.

(17) If one named as covenantee in the deed did not execute; in an action brought by his companions, it ought to be so averred. Vernon v. Jefferys, Str. 1146. 7 Mod. 358. 8vo. ed. S. C. more fully reported.

this indenture, an action cannot be brought thereon, except by those who are parties during their lives, and after their death by the executor or administrator of the survivor.

So where Rt. Mackreth for himself, and the defendant as his surety^b, jointly and severally covenanted with J. Anderson, his executors, administrators, and assigns, and also with E. Wyatt and her assigns, that he (Mackreth) would pay to Anderson, his executors, and administrators, an annuity during the life of E. Wyatt; Anderson died intestate, and an action was brought by his administrator against the defendant on the covenant, assigning as a breach the non-payment of the annuity. *On demurrer*, it was holden, that the covenant being both to Anderson and Wyatt for the same thing, although the benefit were only to Wyatt, yet both had a legal interest in the performance of it, and therefore, such interest being joint, during the lives of both, on the death of one, it survived to the other.

The reversion of lands demised by indenture to the defendant for years^c, was conveyed to A. and B. and the heirs of B., in trust for A. and his heirs; A. brought an action against defendant, on a covenant to repair contained in the lease, stating his title as before-mentioned; *on demurrer*, it was holden, 1st. that A. and B. were joint assignees of the reversion, the effect of which was, that the defendant's covenants became, by operation of law, contracts with A. and B. jointly, and that all causes of action to them arising out of those contracts, must follow the nature of the contracts, and must accrue to A. and B. jointly: 2dly. That on general demurrer, it could not be intended that B. the joint covenantee was dead, in order to sustain the declaration; that plaintiff ought to have shewn what was necessary to make out his title, and having by his own statement given the legal estate to *himself and another*, he ought to have taken upon himself the burthen of divesting that legal estate in the other, and vesting it in himself; he should therefore have averred that B. was dead.

From the preceding cases of *Anderson v. Martindale*, and *Scott v. Godwin*, it appears, that if the objection on the ground of other covenantees not being joined as plaintiffs arises on the face of the declaration, the defendant may take advantage of it by demurrer, and according to *Slingsby's* case, by writ of error (18).

^b Anderson administrator, &c. against Martindale, B. R. T. 41 G. 3. 1 East's R. 497. ^c *Scott v. Godwin*, C. B. E. 37 G. 3. 1 Bos. & Pul. 67.

(18) Where there are several covenantees, and one of them only

The defendant covenanted^d, that he would not agree for the taking the farm of the excise of beer and ale for the county of York, without the consent of the plaintiff and another; and the plaintiff alone brought this action of covenant; and assigns for breach, the defendant's agreeing for the said excise, without his consent; upon which the plaintiff had a verdict, and one thousand pounds damages given. The court were of opinion, that here was no joint interest, but that each of the covenantees might maintain an action for his particular damages, or otherwise one of them might be remediless: for, suppose one of them had given his consent, that the defendant should farm this excise, and had secretly received some satisfaction or recompense for so doing, is it reasonable, that the other should lose his remedy, who never did consent?

4. *Of void and illegal Covenants.*

Although the law^e, from the deliberation and solemnity which accompanies the execution of a deed, presumes a consideration, and delivers the covenantee from the necessity of proving it, yet that doctrine applies only, where the deed is good on the face of it; for a consideration cannot be presumed to support a deed which is void on the face of it.

Hence where in covenant the plaintiff declared, that defendant, being single and unmarried^f, by deed promised the plaintiff (she being sole and unmarried), that he would not marry with any other person except herself, and if he should marry with any other, then he agreed to pay plaintiff a cer-

^d *Wilkinson v. Lloyd*, 2 Mod. 82.

^e *Lowe v. Peers*, 4 Burr. 2225. Wilmot, 364. S. C.

^f *Lowe v. Peers*, 4 Burr. 2225. Wilmot, 364. S. C.

brings an action, without averring in the declaration that the others are dead; the defendant may either take advantage of it at the trial, as a variance on the plea of *non est factum*, Serjeant Williams, 1 Saunders, 154. n. (1), or he may crave oyer, and demur generally. Bull. N. P. 158. and per Lee C. J. in *Vernon v. Jefferies*, 7 Mod. 360. 8vo. ed. In *Eccleston v. Clipsham*, 1 Saund. 153. the objection having been taken in arrest of judgment the plaintiffs discontinued. N. Where there are two covenantors and one only is sued, the defendant must take advantage of the omission by plea in abatement. Per Lee C. J. in *Vernon v. Jefferies*, 7 Mod. 360. 8vo. edit.

tain sum of money within a fixed time after such marriage: the declaration, after averring that defendant had married another person, assigned for breach, the non-payment of the money: It was adjudged, after motion in arrest of judgment, in B. R. 4 Burr. 2225., and afterwards in the Exchequer Chamber, on writ of error, 14th November, 1769, (see notes of opinions and judgments by Wilmot C. J. p. 364.) that this covenant, not to marry any body except a person, who was not obliged to marry, being to every purpose the same as a general restraint, and being unsupported by any consideration, the principle of public utility interposed, and forbad the sustaining an action for the breach of it.

A covenant by a husband to pay to trustees a certain annual sum^g, by way of separate maintenance for his wife, in case of their future separation, with the consent of such trustees or their executors, is valid in law.

A covenant by a friend of a bankrupt, to pay all his creditors their full debts^h, in consideration that they will not proceed any further under the commission, is good in law.

Where the principal act to be performed, as conveying an estate, granting a lease, &c. is void, relative and dependent covenants are void also: as where A., being possessed of a termⁱ, granted to B. so much of the term as should be unexpired at the time of his death, and covenanted for B.'s quiet enjoyment; the lease being void for uncertainty, the covenant was holden void also.

But where a covenant is a distinct, separate, and independent covenant, not referring to the estate intended to be granted, nor waiting upon it; in that case, although no estate is granted, yet the covenant will be valid (19). As where in covenant^k, the plaintiff declared, that defendant, by deed, granted to plaintiff in fee, provided that if the grantor paid so much money, it should be lawful for him to re-enter, and that defendant covenanted to pay the money

g Rodney v. Chambers, B. R. E. 42 i Capenhurst v. Capenhurst, T. Raym. Geo. 3. 2 East's R. 283. 27. 1 Lev. 45. S. C.
h Kaye v. Bolton, 6 T. R. 134. k Northcote v. Underhill, Salk. 199.

(19) When that which is good and that which is void are put together in the same grant, the common law makes such a construction, that the grant shall be good for that which is good, and void for that which is void. Per Hutton J. Ley's Rep. 79. cited by Lawrence J. 8 East, 236.

to plaintiff, and breach assigned for the non-payment of the money. After judgment by default and writ of inquiry executed, it was objected, that nothing passed by the deed for want of enrolment, which was admitted; and hence it was inferred, that the covenant was void. But Holt C. J. said, that it was not material whether any estate passed; for the covenant to pay the money was a distinct, separate, and independent covenant.

So where a rector granted an annuity out of his benefice¹, which is void by stat. 13 Eliz. c. 20., and in the same deed covenanted personally to pay the rent-charge; it was holden, that although the statute avoided the security of the rent-charge upon the living, yet it did not affect the personal covenant.

So though a bill of sale for transferring the property in a ship, by way of mortgage, may be void^m, as such, for not reciting the certificate of registry, as required by stat. 26 G. 3. c. 60. s. 17., yet the mortgagor may be sued on a collateral covenant, for the payment of the money contained in the same deed.

In like manner, although a covenant by the lessee for payment of the property tax, and for indemnifying the landlord from it, is void by stat. 46 Geo. 3. c. 65. s. 115. 195.; yet that will not avoid other independent covenants in the lease, such as the covenant for the payment of rentⁿ.

Where A. covenants not to do an act^o, which it was then lawful to do, and a subsequent statute compels him to do such act, this statute extinguishes the covenant; but if A. covenants to do an act then unlawful, and a subsequent statute makes it lawful to do the act, the covenant is not extinguished.

The assignee of a void lease cannot maintain an action for a breach of any of the covenants contained in the lease.

Tenant in tail demised land for 99 years^p, and covenanted for himself and his executors for the quiet enjoyment of the lessee. The tenant in tail died without issue. Soon after his death the lessee assigned to the plaintiff, who entered, but shortly after was ejected by the remainder man, whereupon the plaintiff brought an action against the executors of the tenant in tail for a breach of the covenant; but

¹ *Mouys v. Leake*, 8 T. R. 411.

^m *Kerrison v. Cole*, 8 East, 231.

ⁿ *Gaskell v. King*, 11 East, 165. recognized in *Wigg v. Shuttleworth*, 13 East, 87.

^o *Dyer*, 27. pl. 278. Salk. 198.

^p *Andrew v. Pearce*, 1 Bos. & Pul. N. R. 159.

it was holden, that it would not lie; for the lease being void at the time of assignment, no interest passed under it.

In covenant^q, the plaintiff declared, that by deed made between her *as attorney for I. S.* on the one part, and the defendant on the other part, she demised a house to the defendant, and that he covenanted (not saying with the plaintiff) to pay the rent to I. S., and then assigned a breach in non-payment of rent, to the damage of the plaintiff (the attorney). On demurrer, it was objected that the lease was void, and that an action could not be maintained upon it, especially by the plaintiff, who was the attorney only, and to whom the rent was not reserved; neither was there any covenant *with the plaintiff*, the words being general, *that he covenanted* to pay the rent to I. S.; that the power was not pursued by a lease in the name of the attorney, for it ought to have been in the name of the principal^r. The court gave judgment for the defendant, observing, that in a good lease the rent might be reserved to a stranger who was not a party to the deed, but not in the present case where the deed was void; that the deed being void, so as not to pass any interest in the land, it was but just that it should be void as to the reservation of rent, especially where the covenant was not *with the plaintiff*, and where the rent was not reserved to her.

5. *Of the Covenant not to assign without Licence,*

A covenant not to assign or under-let without licence of the lessor, with a clause of re-entry in case of breach, is frequently introduced into leases, for the purpose of securing to the lessor a responsible tenant in whom he can repose a confidence (20). It will be proper therefore to consider

^q *Frontin v. Small*, Str. 705.

^r 9 Rep. 76 b.

(20) In *Henderson v. Hay*, 3 Bro. Ch. Cas. 692. upon a bill filed for the specific performance of an agreement by a landlord to grant a lease of a public house, containing the *common* and *usual* covenants; Lord Thurlow Ch. was of opinion, that though the covenant not to assign without licence might be a very usual one, where a brewer or vintner let a public house, that would not make it a *common* covenant; and declared, that the landlord was not entitled to have it inserted in the lease. In *Morgan v. Slaughter*, 1 Esp. N. P. C. 8. Lord Kenyon C. J. held such a covenant to be a *fair* and *usual* covenant. But in *Church v. Brown*, 15 Ves. 531.

the effect and operation of such covenant; what will amount to a breach of it, and what to a dispensation from it.

Lessee for years covenanted not to assign, transfer, or set over^a, or otherwise do or put away the lease or the premises thereby demised, or any part thereof, to any person, without the licence of the lessor in writing; it was holden, that an underlease was not a breach of this covenant.

But where the words of the covenant were^t, that the lessee would not set, *let*, or assign over the whole or part of the premises without leave; it was holden, that an underlease amounted to a breach. So where the proviso was, that the lease should be void^u, "if the lessee assigned or otherwise parted with the indenture of lease, or the premises thereby demised, or any part thereof, for the whole, or any part of the term, without leave in writing;" it was holden, that the words included an underlease. And here it is to be observed, that a lease by the lessee for the whole term amounts to an assignment, although the rent be reserved to the lessee, and a power of re-entry given to him, and not to the reversioner^x (21). But if a day only be excepted out of the term, then it is an underlease^y.

If a lease contain a proviso making it void if the lessee^z,

^a *Crusoe dem. Bugby v. Blencowe*, 3 Wils. 224. 2 Bl. R. 766. S.C.

^t *Roe d. Gregson v. Harrison*, 2 T.R. 426.

^u *Doe d. Holland v. Worsley*, 1 Camp. N. P. C. 20. Ellenborough C. J.

^x *Palmer v. Edwards*, Doug. 186. n.

^y *Holford v. Hatch*, Doug. 182.

^z *Roe d. Gregson v. Harrison*, 2 T.R. 425.

the opinion of Lord Thurlow was recognized by Ld. Eldon Chr., and in *Brown v. Ruban*, 15 Ves. 529. Sir W. Grant, M. R. held, that under an agreement for a lease "with usual covenants" the lessor was not entitled to this covenant against assigning or underletting without licence.

(21) In *Poultney v. Holmes*, 1 Str. 405. where the question was, whether a parol agreement by the lessee to transfer the remaining interest in a term of more than three years originally, when there was only a year and a half to run, reserving the rent to himself, and not to the reversioner, was void within the meaning of the statute of frauds, Pratt C. J. ruled at Nisi Prius, that this must be taken as a lease, and not as an assignment; because the rent was reserved to the lessee. It is observable that when this case was cited in *Palmer v. Edwards*, Buller J. said, that it did not come up to that case; for *Poultney v. Holmes* only determined, that what could not be supported as an assignment should be good as an underlease.

his executors, or administrators, alien without licence in writing, a *voluntary* assignment by the executor or administrator, without such leave, will amount to a forfeiture (22).

An assignment by operation of law will not amount to a forfeiture:

This point was decided for the first time in *Mitchinson v. Carter*, 8 T. R. 57. where it was holden, that an assignment to a person purchasing the term from the sheriff under a *bonâ fide* execution, would not amount to a forfeiture (23).

(22) In *Seers v. Hind*, 1 Ves. Jun. 295. one of the questions was, whether executors were warranted in disposing of a lease as assets of the testator, where there was a proviso against alienation by the *lessee*. Lord Thurlow Ch. said, "If A. lets a farm to B., with a covenant not to alien, and B. dies, may not his executors dispose of the term? I think it has been determined that they may, and I have always taken it to be clear law. It is an alienation by the act of God. I remember Lord Camden entered into the question much in the same way. He took it to be clear law, that an alienation by death could not be a forfeiture. In the case of a lease for years to A., it goes to his executors, not by way of limitation, as in the case of a remainder over, &c., but it goes to them as coming in the place of the lessee. I understood it to be well settled as I have stated. But I do not mean to lay down, that a man may not by a clause in his will provide, that in case of a devolution to executors, it shall not be alienable by them; but it must be very special for that purpose."

(23) It seems that the same rule would hold in the case of an assignment under a commission of bankrupt: and of this opinion was Lord Macclesfield, in *Goring v. Warner*, 2 Eq. Cas. Abr. 100. and 7 Vin. 85. pl. 9. conceiving that an assignment of this kind, being by virtue of a statute, was not within the terms of the covenant, which extended only to the act of the party. So Lord Hardwicke Ch. in *Philpot v. Hoare*, Amb. 480. expressed an opinion, that a covenant by a lessee not to assign without licence, did not bind the assignee of the lessee under a commission of bankrupt, if the assignment was not fraudulent. See also 3 Wils. 237. and *Fox v. Swan*, Sty. 483.

It appears from the preceding opinions, that a mere covenant not to assign without licence in writing, is not sufficient to protect the interests of the lessor in all events, and therefore cautious landlords cause a special proviso to be inserted in their leases, providing against the consequences of a bankruptcy. The form of this proviso may be seen in *Roe d. Hunter v. Galliers*, 2 T. R. 183. where the validity of a covenant of this kind was called in question, the

But where the execution is in fraud of the covenant^a, the assignment under it will amount to a forfeiture, and the lessor may re-enter; as where the lessee gives a warrant of attorney to confess judgment to a creditor for the express purpose of enabling such creditor to take the lease in execution under the judgment.

Under a covenant not to alien without leave, if leave is once granted, the covenant is entirely discharged:

Corpus Christi College, in Oxford^b, demised land for a term of years to A., with a condition, that neither A. or his assigns should alien the land without the special licence of the lessors; afterwards the lessors, by writing under seal, licensed A. to alien the land to any person, and A. afterwards assigned the term to B.: after B.'s death, C. became entitled to the term, and assigned it to the defendant Syme. The lessors entered for condition broken. It was resolved by the court, that the alienation by licence to B. had determined the condition as to the assignees; and that it was not in the power of the lessors to dispense with an alienation for one time, and yet to consider the estate aliened or demised as afterwards remaining subject to the condition; for a condition is to be taken strictly, and by the alienation with licence it is satisfied.

So in the case of a demise to A., B., and C.^c, with a like condition, if a licence to alien be granted to A., and A. aliens by virtue of such licence, the condition is determined as to B. and C. (24).

^a Doe d. Mitchinson v. Carter, 8 T. R. 300.

^b Dumper v. Syme, 4 Rep. 119 b. Cro. Eliz. 815. 1 Roll. Abr. 471. (G.) pl.

1. S. C. See the record of special verdict, Co. Ent. 684 b. pl. 22.

^c Leeds and Crompton adjudged; cited in 4 Rep. 120. a. 1 Roll. Abr. 472. (G.) pl. 7. S. C.

court however decided in favour of it. But N. if standing timber be sold to a trader with a proviso in case of bankruptcy, that the vendor shall retake it, such proviso is void. Holroyd v. Gwynne, 2 Taunt. 176.

See also Doe v. Clarke, 8 East, 185, where a term for years in a house was made to continue and depend on the personal occupation of the lessee; the lessee, having become a bankrupt, ceased to live in the house in consequence of his assignees having sold it, it was holden, that there was an end of the bankrupt's interest in the premises, and that the lease was determined.

(24) So in the case of a demise, upon condition that the lessee shall not alien the land or any part thereof without the assent of

Whether the licence to assign be general, as in the preceding case of *Dumper v. Syms*, or particular as "to one particular person^d, subject to the performance of the covenants in the original lease," yet the condition is gone, and the assignee may assign without licence.

It is to be observed, that acceptance by the lessor of rent due after condition broken *with notice*, is a waiver of the forfeiture^e.

6. Of the Covenant for quiet Enjoyment.

A general covenant for quiet enjoyment does not extend to tortious entries by a stranger^f. This opinion prevailed at an early period of our law, for in the Year Book 26 H. 8. 3. b. we find the following case: A man made a lease for years by indenture, and by a clause in that lease covenanted to warrant the demised premises during the term of the lessee; afterwards the lessee was ousted by one who had not any right to the premises; and the question was, whether the lessee should have writ of covenant against the lessor or not; and Englefield J. said, "The lessee shall not have writ of covenant against his lessor where he is ousted by wrong; for he may have writ of trespass or *ejectione firmæ* against him who ousted him; but if he was ousted by one who had title paramount against him, as in that case he cannot have any remedy [against the person ousting him,] he may have writ of covenant against the lessor by force of the warranty: *quod fuit concessum per plusors*" (25).

The doctrine laid down in the foregoing case is not confined to covenants in leases for years, for in *Dudley v. Folliott*, B. R. E. 30 Geo. 3. 3 T. R. 584. it was adjudged, that a general covenant in a conveyance of lands in fee, that the grantor had legal title, and that the grantee might peaceably enjoy the premises without the interruption of the grantor

^d *Brummell v. Macpherson*, 14 Ves. 173. Eldon Ch.
^e *Goodright d. Walter v. Davids*, Cowp. 804. *Whicheot v. Fox*, Cro. Jac. 399.

^f *Davie v. Sacheverell*, adjudged on demurrer. 1 Roll. Abr. Condition, (V) pl. 7. *Hayes v. Bickerstaff*, E. 21 Car. 2. Vaugh. 119.

the lessor, and afterwards the lessee aliens part, with the assent of the lessor, the lessee may alien the residue without such assent, per Popham C. J. 4 Rep. 120. a. who denied the contrary position, (though adjudged in *Dyer*, 334 b. pl. 32.) to be law.

(25) See also 22 H. 6. 52 b. pl. 26. 26 H. 8. 3. b. pl. 11. F. N. B. 342. ed. 4to. to the same effect.

and his heirs, or any other person, did not extend to the acts of wrong doers ; but only to the acts of persons claiming by a legal title.

The distinction taken in these cases illustrates the reason of the following rule, viz. that in actions for breach of a general covenant for quiet enjoyment, it is essentially necessary, that it should appear on the face of the declaration, that the eviction was made by a person claiming by a legal title. In *Tisdale v. Sir W. Essex*, Hob. 34. in an action on a covenant in a lease for years, for enjoyment during the term, the breach assigned was, that one H. Elsing entered upon the plaintiff and ejected him. The question, on demurrer was, whether the ejectment by Elsing being taken to be by wrong, because no title was laid in him, should be adjudged a breach of covenant ; the court was of opinion that it should not be so adjudged (26).

From the following cases it may be collected in what manner the averment of title in the party evicting ought to be made, in assigning the breach of covenant.

In an action on a covenant^s in a lease for quiet enjoyment

g *Foster v. Pierson*, 4 T. R. 617.

(26) The following abridgment of the record, in *Tisdale v. Essex*, is taken from *Winch's Entries*, 119. ed. 1680. "Count upon indenture of articles brought by Tisdale against Essex, in which defendant covenanted that the plaintiff should enjoy certain lands for seven years, from such a day, and that he should quietly remove such edifices as should be erected during the term, within three months after the expiration of the term, and that defendant would make plaintiff a good lease, or some security for the quiet enjoyment of the premises, and thereupon the plaintiff covenanted to pay defendant a certain rent, and that he would deliver up possession to the plaintiff at the end of the term. Averment, that he entered on such a day and became possessed, and assigns for breach, that one Elsing ejected him. Demurrer. Joinder." To the record, which is stated at length in *Winch's Entries*, Winch has subjoined the following note: "In this case two points were moved—The one, if it were a lease for seven years—2. If there was a good breach assigned.—My opinion and that of my brother Nycholls, was, that it was a good lease. Warburton e contra. On the second point, Warburton and Jones held, that there was not any breach assigned. Nycholls e contra."—(Winch has not mentioned what his own opinion on the second point was ; but he concludes the note with stating, that Hobart C. J. was of opinion with him in both points, and judgment was given against the plaintiff.)

the breach assigned was, that *at the time of the demise* to the plaintiff, one J. B. Pierson had lawful right and title to the premises, and *having such lawful right and title, entered and ejected* plaintiff. On special demurrer to the declaration, it was objected, that the plaintiff, in alleging the eviction, ought to have shewn the title of J. B. Pierson, or at least it should have been averred, that J. B. Pierson had such a title as was inconsistent with the plaintiff's title to possess these premises; that though it was alleged, that J. B. P. had lawful right and title to the premises, he might only have had a title to recover in a real action, and not a right of entry; and that the mischief to be apprehended from this loose mode of pleading was, that it might give cover to an eviction by collusion (27). The court overruled the objections, and gave judgment for the plaintiff; Lord Kenyon C. J. observing, that if the declaration was certain to a common intent, it was sufficient; that it would be doing violence to the words to say, that the lawful right and title, which it was stated J. B. P. had, did not legalize his entry; that the fair import of the words was, that he had lawful right and title to do that which he did. Buller J. said, that when it was stated "that the party having a lawful right and title entered," it was the same as saying, "He entered by lawful right and title." In the preceding case the objection "that the title of the party evicting was not *particularly* set forth," was not pressed upon the court; but in *Hodgson v. the East India Company*, 8 T. R. 278. this objection recurred, and the attention of the court was directed to it; but it was overruled, notwithstanding a contrary decision on error in the Exchequer Chamber, in *White v. Ewer*, Cro. Eliz. 823.; and Lord Kenyon C. J. delivering the opinion of the court, said, that to compel the plaintiff to set forth the particulars of the title of the person who entered on him, would impose insuperable difficulties on him; for the knowledge of those particulars could not be acquired, except by an inspection of title deeds, to which plaintiff could not have any access. It must be observed, however, that although it be not necessary to set forth the particulars of the title of the party evicting, yet room must not be left for any intendment, that such title is derived from the plaintiff; for where defendant^b

^b *Wotton v. Hele*, 2 Saund. 177.

(27) Another objection was taken, viz. that it was not stated, that the plaintiff was evicted by legal process; but this objection was abandoned, the precedents being against it.

by fine *sur concessit* granted certain lands to plaintiff for years, and warranted the same against all men during the term; in an action of covenant on this warranty, the breach assigned was, that one S., after the commencement of the term, and during the term, having lawful right and title to the premises, entered and ejected plaintiff; defendant tendered issue on the ejectment: after verdict for plaintiff, it was moved in arrest of judgment, that the breach was not well assigned; because S. might have had, at the time of his entry, a lawful right and title to the premises under the plaintiff himself; and as it was not stated in the declaration, that S. had title to the premises *before* the fine was levied, it should be intended, that he had a right to the premises, at the time of his entry, by a puisne title, to which the covenant of defendant did not extend. The court (*absente* Kelynge C. J.) held that the breach was not well assigned.

So in an action against executors¹ (in their own right) who had assigned a lease belonging to their testator by way of mortgage, and had covenanted for good title and quiet enjoyment of the plaintiff, without disturbance from them or any other person; the breach assigned was, that the plaintiff was evicted in consequence of a judgment in ejectment, by one Yates, *having lawful title* to the premises. On special demurrer it was objected, that it did not appear that Yates's title commenced by any act of the defendants, or prior to the assignment made by them to the plaintiff, who might therefore have been evicted by means of some act done *by himself* since the assignment. Judgment for the defendants.

This intendment, viz. that the title of the party evicting was derived from plaintiff, may be precluded by averring, (if the facts of the case warrant such an averment) that the person evicting entered by lawful title, which accrued to him *before* the date of the conveyance to the plaintiff (28), as in *Buckly v. Williams*, 3 Lev. 325. Covenant upon ar-

¹ *Noble v. King and Smith*, 1 H. Bl. 34.

(28) Or by averring that *at* the time of the demise to the plaintiff, the party evicting had lawful title; as was done in *Foster v. Pierson*, 4 T. R. 617. and ante p. 432, or that the party evicting entered by virtue of a title theretofore made, *by, from, and under the defendant*, as was done in *Hodgson v. India Company*, 8 T. R. 278. But merely averring that J. S. entered *claiming* title from the defendant, is not sufficient, *Aleyn*, 38. *Eeles v. Lambert*.

titles, whereby defendant covenanted that plaintiff should quietly enjoy a close, and that one Knolls (who had a title to the premises by virtue of a certain lease to him thereof, made *before the making of the articles aforesaid*,) entered upon the plaintiff and expelled him. After verdict for plaintiff, it was moved, in arrest of judgment, that the breach was not well assigned; because plaintiff did not shew what title Knolls had; and, perhaps, the title which he had was under the plaintiff; but the objection was overruled; for the title of Knolls could not be supposed to be under the plaintiff; for the declaration states, that Knolls had a title by virtue of a demise made to him *before the making of the articles to the plaintiff*, and let the title be derived from whom it will, yet being before the articles made with the plaintiff, the covenant is broken.

The preceding remarks have been confined to the cases of general covenants and evictions by strangers; but in cases where the covenant is particular, as against interruption by the grantor or lessor, or by any person expressly named; upon the eviction of the covenantee by the grantor or lessor, or by the person expressly named, it is not necessary for the plaintiff to aver title in the party evicting.

In covenant^k, the declaration stated that the defendant granted a messuage, with the appurtenances, to plaintiff in fee, and covenanted for plaintiff's quiet enjoyment thereof, without the lawful let, entry, eviction, or interruption of the defendant; and assigned for breach, that defendant hindered plaintiff in the enjoyment of a pew appurtenant to the messuage; on general demurrer it was objected, that the injury complained of ought to be the subject of an action of trespass, but could not be the foundation of this action, the covenant being against all lawful disturbance: to this it was answered, that, where the breach complained of was the act of the covenantor, any interruption was sufficient to support this action against him. Judgment for the plaintiff; Ashurst J. observing, that it was not necessary that the party against whom the action was brought should *have a title*; it was sufficient if he did the act *under a claim* of title; that in this case the act itself asserted a title; for the defendant locked up the pew, which was as strong an assertion of right as could well be imagined.

So where, in covenant^l, the plaintiff set forth a covenant which recited that defendant had sold, to the plaintiff's testator, goods which had been arrested by one Bell, and

^k Lloyd v. Tomkies, 1 T. R. 671.

^l Perry v. Edwards, 1 Str. 400.

therefore defendant covenanted to plaintiff's testator, to save him harmless from any costs or damages relating to such seizure, and then assigned for breach, that the said Bell, having arrested the goods *under pretence* of a debt due from defendant to him, touching which arrest testator was put to great expense, which defendant neglected to pay. It was objected, that the covenant did not extend to tortious acts, for which the plaintiff had a remedy, and therefore the title of Edward Bell ought to have been set forth; that "having lawful title" was not sufficient; that here it was only said "under pretence," which was not so strong. The counsel for the plaintiff admitted it to be a general rule, that the plaintiff must shew a title in the disturber; but insisted that that rule extended only to the case of a general covenant, and not where it was particular against the acts of particular persons; for in that case it comprehended even tortious acts. And by the court: This pretence of Bell's being recited in the covenant, shews it was meant as a security against it in all events; and though it should be tortious, yet being particular, it falls within the distinction that has been well taken. Adjourned, and Hil. T. following, judgment for plaintiff, defendant's counsel declining to argue it.

IV. *By whom the Action of Covenant may be maintained,*

1. *Heir.*
2. *Executor.*
3. *Assignee.*

1. *By Heir.*—COVENANTS which run with the land will descend to the heir of the covenantee; and he may sue for a breach thereof; as where the lessee covenanted with the lessor^m, his executors, and administrators, to repair; it was holden, that the heir of the lessor, though not named, might have covenant against lessee for not repairing.

Plaintiff declared as heir on a covenant by lessee for years to repairⁿ, and assigned for breach, that the premises were out of repair for a period of time which included a portion

^m *Lougher v. Williams*, 2 Lev. 92.
ⁿ *Skin. 305.*

ⁿ *Vivian v. Champion*, Salk. 141.

of his ancestor's life; and on this ground an exception was taken in arrest of judgment, after verdict for the plaintiff; but it was overruled, Holt C. J. observing, that if the premises were out of repair in the time of the ancestor, and continued so in the time of the heir, it was a damage to the heir; and the jury gave as much in damages as would put the premises in repair, respect being had, not to the length of time they had continued in decay, but to what it would have cost, *at the time of action brought*, to put the premises in repair.

2. *By Executor*.—A. and B. his wife, by indenture, demised lands to C. for 21 years, and thereby covenanted, that they (*viz.*) A. and B. would at the end of the 21 years make a good lease to C. *and his assigns* for 21 years^o, commencing at the expiration of the first term. During the first term the lessee died, having made his will, and appointed D. his executrix, who entered, &c. and died, having made her will and appointed the plaintiff her executor, who entered, &c. At the expiration of the first term, A. and B. having refused to grant the further lease, an action was brought by the plaintiff (as executor of D. executrix of C. the lessee) on this covenant against A. the husband; and it was adjudged, that the action would well lie (29).

Covenant by the plaintiff as executor of J. S.^p The defendant sold lands to J. S. and covenanted with him, his heirs, and assigns, that he should enjoy the lands against all persons claiming under one A.; and the breach assigned was, that B. and C., in the life-time of the testator, entered claiming under A. On demurrer to defendant's plea, it was contended, for the defendant, that the covenant was with J. S., his heirs, and assigns, touching an estate of inheritance; and, therefore, that the action ought to have been brought by the heir or assignee, and not by the executor: but it was resolved by the court, that the eviction being to the testator in his life-time, he could not then have an heir or assignee of this land, and therefore the damages belonged to the executor, though not named in the covenant; for he represented the person of the testator.

^o Chapman v. Dalton, Plowd. 234. a. ^p Lucy v. Levington, 2 Lev. 26. 1 Vent. 175. S. C.

(29) The reasons of the judgment are not mentioned in the report; but it appears to have been decided on the ground that the plaintiff, being executor of D. who was executrix of C. the lessee, was as such entitled to the benefit of his covenant.

3. *By Assignee.*—Assignee of part of the reversion of all the land demised^q, may take advantage of the covenants contained in an indenture of demise; for he is an assignee within the stat. 32 H. 8. c. 34.

As the assignee of a term is bound by covenants which run with the land, so may he take advantage of them^r.

If a man demise or grant land to a woman for years^s, and the lessor covenant with the lessee to repair the houses during the term, the woman takes husband, and dies, the husband shall have an action of covenant as well on the covenant in law upon the words "demise or grant," as upon the express covenant. The law is the same with respect to tenant by statute merchant, or statute staple or elegit, of a term, and with respect to him to whom a lease for years is sold by force of any execution, who shall have an action of covenant in the like case as a thing annexed to the land, although they come to the term by act of law.

So the executor of B^t. the executor of A. is entitled to the benefit of a covenant made with A. and his assigns, for he is the assignee in law of A. N. The word *assignee* comprehends the assignee of the assignee, the executors of the assignee of the assignee^t, and the assignee of the executor or administrator of the assignee.

Stat. 32 H. 8. c. 34.—The stat. 32 H. 8. c. 34. after reciting, that many temporal and religious persons had made leases and grants of land for life or lives, or for term of years, by writing under seal, containing conditions and covenants to be performed as well on the part of the lessees and grantees, their executors and assigns, as on the part of the lessors and grantors, their heirs and successors; and *that by the common law no stranger to any covenant could take advantage thereof, but only such persons as were parties or privies thereunto*; by reason whereof grantees of reversions, and grantees and patentees of lands lately belonging to religious houses, were excluded from any entry or action against the lessees and grantees, their executors and assigns, for breach of any condition or covenant, enacts, "that all persons and bodies
" politic, their heirs, successors, and assigns, having any
" gift or grant of the king, of any lands or other heredita-
" ments, or of any reversion of the same, which belonged to
" any of the monasteries, &c. dissolved, or by any other
" means come to the king's hands, since the 4th day of

^q 1 Inst. 215. a.

^r Cro. Eliz. 553.

^s Spencer's case, 5 Rep. 17. a. 5th Re-
solution.

^t Chapman v. Dalton, Plowd. 284. a.
antc, p. 437.

^u Spencer's case, 5 Rep. 17. b.

“ February, A. D. 1535, or which at any time before the
 “ passing this act belonged to any other person, and after
 “ came to the hands of the king, and all other persons being
 “ grantees or assignees to or by the king, or to or by (30)
 “ any other person than the king, and their heirs, executors
 “ (31), successors, and assigns, shall have like advantages
 “ against the lessees, their executors, administrators, and
 “ assigns, by entry for non-payment of the rent, or for doing
 “ waste or other forfeiture (32), and by action only for not
 “ performing other conditions, covenants, or agreements
 “ expressed in the indentures of leases and grants, against
 “ the said lessees (33) and grantees, their executors, ad-
 “ ministrators, and assigns, as the said lessors and grantors,
 “ their heirs or successors, might have had. By s. 2. all
 “ lessees and grantees of lands or other hereditaments for
 “ term of years, life, or lives, their executors, administrators,
 “ or assigns, shall have like action and remedy against all
 “ persons and bodies politic, their heirs, successors, and
 “ assigns, having any gift or grant of the king, or of any
 “ other persons, of the reversion of the same lands and

(30) It seems to have been the opinion of the court in *Lee and Arnold's case*, 4 Leo. 29. that the bargainee of a reversion, by bargain and sale, indented and enrolled, was an assignee within this statute, though he hath but an use by the act of the party, and the possession by stat. 27 H. 8.

(31) In respect of this word, it hath been holden, that an assignee of part of the reversion, as an assignee of the reversion for years, of all the estate demised, may enter for condition broken. *Matures v. Westwood*, B. R. H. 40 Eliz. Cro. Eliz. 599, 600. 617. Moor, 527. S. C. 1 Inst. 215. a. But the grantee of the whole estate in reversion in part of the thing demised, is not within the meaning of the statute, as if the reversioner in fee of 4 acres grants 2 acres in fee, the grantee cannot enter, because conditions cannot be apportioned by act of the party, 4 Leo. 27.

(32) Although the words of the statute be for non-payment of the rent, or for doing of waste or other forfeiture, yet the grantees or assignees shall not take advantage of every forfeiture by force of a condition, but of such conditions only, as either are incident to the reversion, as rent; or for the benefit of the estate, as for keeping the house in repair, for making fences, scouring ditches, preserving woods, or such like, and not for the payment of any sum in gross, delivery of corn, wood, or the like. 1 Inst. 215. b. Moor, 876. pl. 1228.

(33) This statute does not extend to covenants upon estates tail. 1 Inst. 215. a. See also the preamble.

“ hereditaments so letten, or any parcel thereof, for any
 “ condition or covenant, expressed in the indentures of
 “ their leases, as the same lessees might have had against the
 “ said lessors and grantors, their heirs and successors.”

The first section of the preceding statute gives to the assignee of the reversion two remedies, one, by entry for non-payment of rent, doing waste, or other forfeiture; and the other, by action, for not performing other conditions, &c.; and as the remedy by *entry*, according to the construction made by Sir Edward Coke, 1 Inst. 215. b. is confined to forfeitures by force of such conditions, as either are incident to the reversion, or for the benefit of the estate; so it hath been resolved^x, that the remedy by *action* is confined to the breaches of such covenants, as relate to the thing demised, and not to collateral covenants. And on this ground, where the mortgagor and mortgagee of a term made an under-lease^y, in which the covenants for the rent and repairs were with the mortgagor and his assigns only; it was holden, that the assignee of the mortgagee could not maintain an action for the breach of these covenants; because they were not covenants running with the land, but collateral covenants, being entered into with a stranger to the land, that is the mortgagor, who had only an equity of redemption. If the estate in reversion^z, in respect of which the condition or covenant was made, be extinguished, the condition or covenant is also extinguished: As where a lease was made for 100 years, and the lessee made an under-lease for 20 years, rendering rent, with a clause of re-entry; and afterwards the original lessor granted the reversion in fee, and the grantee purchased the reversion of the term; it was holden, that the grantee should not have either the rent, or the power of re-entry; for the reversion of the term to which they were incident, was extinguished in the reversion in fee (34).

Tenants in common of a reversion may maintain covenant against the assignee of the term for the recovery of arrears of rent, although it should appear, that at the time of action

x Spencer's case, 5 Rep. 18. a.

y Webb v. Russel, 3 T. R. 402, 3.

z Moore, 94. pl. 232. recognised by

Kenyon C. J. delivering the opinion of the court in Webb v. Russel, 3 T. R. 402, 3.

(34) “ He who enters for condition broken must be in of the same estate, which he had at the time of the condition created.”
 4 Rep. 120. b.

brought the reversion was out of the plaintiffs, they having granted it over, after the rent became due^a.

N. In *Glover v. Cope*^b, B. R. Pasch. 3 W. & M. Carth. 205. it was adjudged, after two solemn arguments, by Holt C. J. and the court, that the grantee of the reversion of copyhold lands was within the intention and equity of the preceding statute, which is a remedial law, and of great and universal use, and absolutely necessary as well for copyholders as others; and that by this construction of the statute the lords of copyhold manors could not be injured.

Lessee for years assigns over his term by indenture to J. S.^c, and in the same deed he covenants that J. S. and his assigns shall enjoy the land during the term without interruption from any person; after which J. S. assigns over the term by parol, and the assignee being disturbed brought an action of covenant; and adjudged, that it well lies; although the assignment was not by writing (35) because the assignee was privy in estate.

A person to whom an apprentice is assigned according to the custom of the city of London^d, cannot maintain covenant on the indenture of apprenticeship, to which he is not a party; because custom cannot make an assignee, so as to entitle him to an action.

V. *Against whom the Action of Covenant may be maintained,*

1. *Heir.*
2. *Executor.*
3. *Assignee.*

1. *Against Heir.*—An action of covenant will lie against the heir on a covenant by his ancestor for himself and his

^a *Midgley and another v. Lovelace*, Carth. 289. 12 Mod. 45. S. C.
^b 3 Lev. 326. Skin. 306. S. C.

^c *Awder v. Nokes*, Cro. Eliz. 436. recognised and briefly stated in 3 Rep. 63. a.

^d *Barker v. Beardwell*, 1 Show. 4.

(35) But now by stat. 29 Car. 2. c. 3. s. 3. leases, estates, or interests, either of freehold, terms of years, or uncertain interest, cannot be assigned, unless by deed or note in writing, signed by the assignor or his agent, or by operation of law.

heirs (36), as well as an action of debt will lie against the heir on a bond, wherein the ancestor has bound himself and his heirs^e.

It is not necessary to allege in the declaration, that the heir has lands by descent (37).

In an action on a breach of covenant in a lease for quiet enjoyment, the declaration, after stating that defendant's ancestors granted the lease in question, alleged, that the reversion vested in the defendant *by assignment*; defendant, by guardian, pleaded, that the reversion did not vest in him *modo et forma*: it appeared in evidence, that the estate descended to the defendant, an infant, as heir at law to the lessors^f; whereupon it was objected, that the reversion vested in the defendant by *descent* and not by *assignment*; and that if the declaration had charged the defendant as heir, he might have prayed the parol to demur, in order that he might have an opportunity of electing whether he would take the estate subject to the incumbrance or not. But the court was of opinion, that if the defendant had intended to avail himself of his infancy, he ought to have pleaded it; that it was sufficient to prove the substance of the issue, which was, that defendant was clothed with such a character as would make him liable to the covenant; and that was sufficiently proved by shewing that the estate was vested in him; for whether he was *in possession* as assignee or heir at law, he was equally liable to this covenant.

2. *Against Executor*.—Executors and administrators are bound by the covenants of their testator or intestate, although they be not named; unless the covenants are such, as in their nature determine by the death of the covenantor (38).

^e Dyke v. Sweeting, Willes, 585.

^f Derisley v. Custance, 4 T. R. 75.

(36) See the form of declaration. Gifford v. Young, Lutw. 287.

(37) It seems, however, that, in this case, as well as in debt on bond against the heir, if the heir has not any lands by descent, he may insist on it by way of defence to the action. See the form of plea of *riens per descent* to an action of covenant against heir. Lutw. 290.

(38) It was said by the court in Hyde v. Dean of Windsor, Cro. Eliz. 553. that covenant lies against an executor in every case, although he be not named, unless it be such a covenant, as is to be performed by the person of the testator, which the executor cannot perform.

Executors and administrators may be sued as assignees^g; for they are assignees in law of the interest of the term^h.

Where covenant is brought against an executorⁱ, although the breach assigned be for default of reparation committed in the time of the testator, yet the judgment must be *de bonis testatoris*; for it is the covenant of the testator which binds the executor as representing him, and therefore he must be sued by that name.

Covenant by testator to teach an apprentice his trade is binding on the executors^k, and they ought to see that the apprentice is taught his trade; and if they are not of the same trade, they ought to assign him to another who is of the trade, so that he may be taught according to the covenant.

3. *Against Assignee.*—1. If the covenant extends to a thing in esse parcel of the demise, as a covenant to repair^l; to reside constantly on the demised premises^m; to leave part of the land demised every year for pastureⁿ, or the like, the thing to be done by force of the covenant, is in a manner annexed and appurtenant to the thing demised; it is parcel of the contract and tends to the support of the thing demised; hence it shall bind the assignee, *although he be not named*; and the assignee by act in law, as tenant by elegit of a term, or he to whom a lease for years is sold by force of any execution, is equally bound with the assignee by act of the party^o.

2. If the covenant relates to a thing *not* in esse at the time of the demise, but to be done upon the thing demised, as a covenant to build a new wall upon the land demised; it shall bind the assignee, *if named*.

3. If the covenant relates to a thing merely collateral to and not in any respect concerning the thing demised^p, as a covenant to build a house on the land of the lessor, which is not parcel of the demise; or to pay any collateral sum to the lessor, or to a stranger^q; the assignee, *though named*, is not bound by such covenant; because the thing covenanted to be done is merely collateral, and not in any respect touching or concerning the thing demised (39).

g *Tilney v. Norris*, E. 12 W. 3. B. R. Carth. 519. 1 *Ld. Raym.* 453. *Salk.* 309. S. C.

h Per Fleming C. J. 1 *Bulstr.* 23.

i *Collins v. Throughgood*, Hob. 188.

k *Walker v. Hull*, 1 *Lev.* 177. *Sed quæ.*

l *Dean and Chapter of Windsor's case*, 5 *Rep.* 24 a.

m *Tatem v. Chaplin*, 2 H. Bl. 133.

n *Cockson v. Cock*, Cro. Jac. 125.

o 6th Resolution. *Spencer's case*, 3 *Rep.* 17 b.

p *Spencer's case*, 2nd Resolution.

q *Mayho v. Buckhurst*, Cro. Jac. 438.

(39) It is a substantive, independent agreement, not *quodam*

In order to bind the assignee, even though named, it is essentially necessary, that the thing covenanted to be done, or not to be done, should directly affect the nature, quality, or value of the thing demised, or the mode of occupying it. Hence, where in a lease of land^r, with liberty to make a water-course, and erect a mill, the lessee covenanted for himself and his assigns, not to hire persons to work in the mill, who were settled in other parishes, without a certificate of their settlement; it was holden, that this covenant was not binding on the assignee of the term; because the state of the thing demised would be the same at the end of the term, whether the parish were more or less burdened with poor, and although the value of the reversion would not be so great if the poor's rate were increased, yet that burden would be increased by a collateral circumstance; and the work to be done being the same, whether it were done by workmen from one parish or another, could not affect the mode of occupation.

4. If a covenant relates to personal goods^s, as on a demise of sheep for a certain time, if the lessee covenants for himself and his assigns to redeliver the sheep at the end of the time, and the lessee assign the sheep over, this covenant (40) will not bind the assignee, *though named*; because there is not any privity. In the case of realty there subsists a privity between the lessor and the lessee, and his assigns, in respect of the reversion, but in the case of lease of personal goods, there is not any reversion, but merely a chose in action in the personalty, which cannot bind any but the covenantor, or his personal representative (41).

^r Mayor of Congleton v. Pattison, B.
R. Trin. 48 G. 3. 10 East, 130.

^s Spencer's case, 3d Resolution.

modo, but *nullo modo* annexed or appurtenant to the thing leased. per Wilmot C. J. delivering the opinion of the court in Bally v. Wells, Wilmot, 345.

(40) "The covenant in this case is not collateral, but the parties, that is, the lessor and assignee, are total strangers to each other, without any line or thread to unite and tie them together, and to constitute that privity, which must subsist between debtor and creditor to support an action." Wilmot C. J. in Bally v. Wells, Wilmot, 345.

(41) "To carry the lien of a personal obligation over to an assignee, and to make him the object of an action at the suit of a person with whom he did not originally contract, *he must in all cases be named*, and there must also be a privity between the assignee and

A lessee of tithes covenanted for himself², his executors, administrators, and assigns, not to let any of the farmers, occupying the estate out of which the tithes arose, have any part of the tithes without the consent of the lessor; and further covenanted for himself and his assigns to find and allow to the lessor sufficient wheat straw for thatching any of the buildings then in lessor's occupation: the lessee assigned to the defendant, who suffered several of the farmers to retain part of the tithes without the lessor's consent. An action having been brought against the defendant for this breach of the covenant, and a verdict for the plaintiff, it was moved in arrest of judgment, that the action would not lie against the defendant, inasmuch as the covenant was merely personal and collateral, binding the lessee only; that tithes were incorporeal, lying in grant, and which therefore would not endure such an annexation of covenant. But the court were of opinion, that there was not any difference between land and tithes as to the annexation of covenants; that this covenant was not a mere collateral covenant, but related to the thing demised, materially and essentially tending to preserve it, and as such, obligatory on the assignee, being named, and there being a privity in respect of the reversioner, the lessor.

Covenant by lessee against the assignees of lessor³. The lessee covenanted to leave all the trees he should plant during the term. The lessor covenanted for himself, his executors, and administrators, to pay for the trees at a fair valuation, by two persons to be named by each party, their executors, administrators, or assigns. The term expired. The defendants, assignees of lessor, refused to name an arbitrator, which was the breach assigned. On general demurrer to the declaration after argument, and time taken to consider, Lord Mansfield C. J. delivered the opinion of the court, that the covenant to refer to arbitration did not run with the land; and therefore the assignees were not bound by it, on

¹ Bally v. Wells, M. 10 G. 3. C. B. 3 ² Gray v. Cuthbertson and another,
Wils. 25. Wilmot, 341. S. C. assignees of Mills, T. 25 G. 3. B. R.
MSS.

the person to whom he becomes engaged; and the covenant must respect the thing leased. The chose in action, which of itself is not assignable, loses that property under those circumstances, and in a waiting dependent state follows its principal; and assignees of leases become liable to assignees of reversions, and *vice versa*." Per Wilmot C. J. *ib.* 345.

the authority of Spencer's case, the assignees not being named.

Where lands are conveyed by A. to B.^a, in fee, to the use of such person as C. shall appoint, and C. covenants for himself and his assigns to pay to A. a fee farm rent for the lands, and afterwards C., in pursuance of his power, makes an appointment to D.; D., the appointee, cannot be sued on the covenant as the assignee of C.; for the appointee has not the estate of C., but is in by the original conveyance.

A covenant which runs with the land^r, e. g. a covenant to repair, is divisible; and will bind the assignee of parcel of the estate demised, *quoad* the repairs of such parcel.

So where covenant was brought by the lessor against the assignee of the lessee for the non-payment of a year's rent^s. Defendant, as to the rent^s for half the year, pleaded an eviction during that time of a moiety of the premises by title paramount. On demurrer, the question was, whether the rent was apportionable: It was holden, that the condition of the assignee was different from that of the lessee who was chargeable on privity of contract; for the assignee was chargeable on the privity of the estate, and in respect of the land; hence the rent in question was apportionable; on the same principle as the rent of the lessee or assignee would have been, in an action of debt or replevin.

As the assignee of a term is chargeable only in respect of the thing demised^b, and on the privity of estate subsisting between him and the lessor, he is not answerable for breaches of covenant committed *before* he became assignee. Neither is he answerable for such breaches of covenant as are committed *after* he has assigned over the thing demised^c; for if an action be brought against him, charging him with such breaches, he may plead, that before the breach was incurred, he assigned *all* his estate and interest in the thing demised to J. S. (42), and this will be a good discharge; and

^s Roach v. Wadham, 6 East's R. 289.

^y Congham v. King, 1 Rol. Abr. 522.

Sir William Jones, 245. S. C. Cro.

Car. 221. S. C. recognized by the

court in Stevenson v. Lambard, 2

East's R. 580.

^s Stevenson v. Lambard, B. R. T. 42

Geo. 3. 2 East's R. 575.

^a This ought to have been pleaded to a moiety of the rent for half a year.

^b Greacot v. Green, Salk. 199. Churchwardens of St. Saviour's v. Smith, 3 Burr. 1271. 1 Bl. R. 351. S. C.

^c Chancellor v. Poole, Doug. 764.

(42) An assignment to a beggar or a person leaving the kingdom, provided the assignment be executed before his departure, is good. Nor will such assignment be considered as fraudulent, although the

it is observable that in such plea; it is not necessary to allege that the lessor had notice of such assignment^d.

From the form of the foregoing plea, it may be collected, that an assignee, in order to exonerate himself from his liability under the covenants in a lease, must convey *all* (43) his estate and interest in the thing demised. If the con-

^d *Pitcher v. Toovey*, Salk. 81. 4 Mod. 71. 2 Vent. 228. Carth. 177. S. C. by name of *Toovey v. Pitcher*, 3 Lev. 293. 1 Show. 340. S. C.

assignee never takes possession. *Taylor v. Shum*, 1 Bos. & Pul. 21. See also *Lekeux v. Nash*, Str. 1221. An assignment to a feme covert, where husband has not refused his assent, is sufficient; for a feme covert is of capacity to purchase of others without the consent of her husband; and though he may disagree and divest the estate, yet if he neither agree or disagree, the purchase is good. *Barnfather v. Jordan*, Doug. 451.

(43) In *Eaton v. Jaques*, B. R. M. 21 G. 3, Doug. 454. it was holden, that an assignment by way of mortgage, was not an assignment of *all* the estate and interest of the assignor, so as to make the mortgagee, *who had never taken possession*, chargeable in debt for rent arrear; although the mortgage had been forfeited before such rent became due; Buller J. observing, "that he had looked into the precedents, and they always alleged "by virtue whereof the assignee entered and was possessed." Having stated this decision it will be proper to remark, that Kenyon C. J. twice expressed his disapprobation of it; 1st in *Westerdell v. Dale*, 7 T. R. 312. "As to the cases respecting the mortgagee, *whether in or out of possession*, he is the legal owner, and must be so considered in a court of law; notwithstanding, he is subject to equitable interests. It is said in one of the cases*, that a mortgagee is only liable when in possession, and that what proves this point is, that in charging the mortgagee, it is necessary to state in pleading, that he entered and was possessed: but, with great deference to the learned judge who gave that reason, I doubt it; I consider those as mere formal words." 2dly, in *Stone v. Evans*, Middlesex Sitings, T. 39 G. 3. cited in 7 East, 341. and reported in *Woodfall's Landlord and Tenant*, 2d ed. p. 113. and Abbott, p. 20. Gibbs having cited *Eaton v. Jaques*, Lord Kenyon said, he could not subscribe to the doctrine laid down in that case; that the defendant, who was assignee of a term by way of mortgage, was liable to the covenants in the lease, not on the ground of possession, but as assignee; his liability was not limited by his possession; so long as he had the legal estate, so long he continued liable. If he had wished to avoid that liability, he should have taken an under-lease.

* *Eaton v. Jaques* had been cited in argument.

veyance falls short of this, it will not amount to an assignment, so as to discharge the assignee from his liability.

In a plea of this kind, it is usual to aver the entry and possession of the person to whom the defendant assigned the premises; but such averment is not traversable^e (44).

That the whole interest in the original lease must be conveyed, in order to make a person chargeable as assignee, will appear from the following cases :

Lessee for lives, of a messuage^f, under a covenant to keep the same in repair during the term, and at the end of the term to deliver it up so repaired, by indenture, "granted and assigned *all his estate*, and interest therein, to A. and his executors, *habendum*, to A. and his executors, for ninety-nine years, *if cestui que vie should so long live*, in as large, ample, and beneficial way, as the grantor, his heirs, &c. held the same, paying a certain rent to the re-

^e Walker v. Reeves, Doug. 461 n.

^f E of Derby v. Taylor, 1 East's R. 502.

(44) See Lord Kenyon's opinion as to this averment in the preceding note. It is to be observed, that assignees of a bankrupt lessee are not liable for rent arrear, where they have not taken possession of the thing demised. Per Kenyon C. J. in Bourdillon v. Dalton and others, assignees of Bell, a bankrupt, Peake's N. P. C. 238. 1 Esp. N. P. C. 233. Neither are they bound to take possession of a *damosa hereditas*, that is, property of the bankrupt, which so far from being valuable, would be a charge to the creditors. The assignees may take to the bankrupt's property or not, according as it is or is not beneficial to the creditors; and consequently they may do such previous acts as are necessary to ascertain whether the property be beneficial or not, before they take to it. Hence, where defendants, assignees of a bankrupt lessee, advertised the lease for sale by auction, in which advertisement they did not state that the premises belonged to them, nor for or by whom they were to be sold, but only generally that there was a saleable term, and no bidder offering, they declined interfering any further with the property; and it did not appear that they had ever taken possession either actually or by receiving or paying any rent; it was holden, that there was not sufficient evidence to fix upon the defendants the characters of assignees of the bankrupt's term, so as to render them responsible for the performance of the covenants in his lease. Turner v. Richardson, 7 East, 335. Some assent of the assignees of a bankrupt to the assignment to them, of the premises, is necessary, in order to charge them with the bankrupt's covenants. Adm. S. C.

versioner." On the expiration of the lives, the reversioner brought covenant against the executors of A., for not yielding up the messuage in repair. It was alleged in the declaration that all the estate and interest of the lessee for life vested in A. by assignment. This was denied by defendants' plea. A case having been reserved and argued, the court directed the *postea* to be delivered to the defendants; Lord Kenyon C. J. observing, that there were not any words in the indenture, by which the freehold, of which the original lessee was seised, was conveyed to the testator of the defendants; that the conveyance of all the grantor's estate, and interest to a man and his executors, for years, could not convey a freehold; that such words meant only their interest, &c. in the legal estate thereby granted; and that the court could not give those words a larger operation than the parties themselves had declared they should have.

The devisee of an *equitable* estate is not liable as assignee :

In covenant against the defendants, "as assignees of *all* the estate and interest of one George Denton, in certain grounds called Dentonholme," which G. Denton, theretofore, by an indenture, dated in the year 1654, had granted to the mayor, &c. of Carlisle, so much of the river or water of Caldew, running along his said grounds, as should be sufficient for the grinding of corn and grain at all times at their mills, with certain other liberties and powers for the use and advantage of those mills; and had covenanted, that he, his heirs, and assigns, &c. should not at any time thereafter divert or obstruct any part of the water granted. The breach assigned was, that the defendants had, after these grounds had vested in them by assignment, wrongfully continued a weir or dam, before then wrongfully erected, in and across the river Caldew, which diverted the water to the prejudice of the plaintiffs' mills. Plea: That "all the estate and interest of G. Denton, in the said grounds, called, &c. did not come to and vest in the defendants by assignment thereof;" upon which issue was joined. It appeared that one Jonathan Wilson was, at and long before the time of the breach of covenant complained of, mortgagee in fee of the lands called Dentonholme, the defendants being only seised of the equity of redemption thereof, as devisees of one Lucy Dixon, the heir of G. Denton. Rent also appeared to have been paid to Lucy Dixon, the owner of the equity of redemption, in her life-time, and to the defendant, Tyson, as her devisee after her decease. The court were of opinion, that, con-

sidering that the whole legal estate in the premises was before, and at the time of the breach of covenant in question, vested in J. Wilson, the mortgagee, and that the defendants, the devisees, were not assignees of any part of that legal estate therein, which formerly belonged to G. Denton, the covenantor, but entitled to the mere equity of redemption thereof, it was impossible to say that the defendants were *assignees* of the estate of G. Denton, within the sense and meaning of the terms in which the issue was framed; and which terms respected that description and quality of estate alone, namely, legal estate, in virtue whereof parties are at all liable to actions of covenant, as assignees.

So where in covenant for rent arrear^b, brought against the defendant as *assignee* of J. S., it appeared in evidence, that by the deed, under which the defendant held, the premises were conveyed to him by J. S. for a day or some days less than the original term; the court were of opinion, that the action could not be maintained, the defendant being an under-lessee, and not an assignee of the whole term.

But where a lessee for years granted *the whole of the term* to J. S.ⁱ, it was holden, that J. S. might maintain an action as assignee of the term against the lessor for a breach of covenant; although in the deed of assignment, the rent was reserved to the lessee, with a power of re-entry in case of non-payment, and although new covenants were introduced into that deed.

With respect to declaring *against* an assignee, it is to be observed, that it is not incumbent on the lessor to set forth mesne assignments. It is sufficient to state, generally, that all the estate, &c.^k of the lessee vested in the defendant by assignment; for it cannot be presumed, that the lessor is acquainted with the particulars of the assignee's title.

VI. Of the Declaration, and herein of dependent Covenants, Conditions precedent, and independent Covenants.

Venue.—As this action is more frequently brought for breaches of covenants contained in leases, than on any other kind of covenants, the following table may be useful, in

^b Holford v. Hatch, Doug. 182.

^k Pitt v Russell, 8 Lev. 19.

ⁱ Palmer v. Edwards, Doug. 187. n.

which the reader will see, at one view, in what cases such action is transitory, and in what local. The principle on which the table is framed is this: where the action is founded on privity of contract, it is transitory, and the venue may be laid in any county (45); but where the action is founded upon privity of estate only, it is local, and the venue must be laid in the county where the estate lies. In the 3d and 4th cases in the table, the privity of contract is transferred by the operation of the stat. 32 H. 8. c. 34.

TRANSITORY.

1. Lessor v. Lessee.
2. Lessee v. Lessor.
3. Assignee of Reversion v. Lessee, stat. 32 H. 8. c. 34.
Thursby v. Plant, 1 Saund. 237.
4. Lessee v. Assignee of Reversion, stat. 32 H. 8. c. 34.

LOCAL.

5. Lessor v. Assignee of Lessee, Stevenson v. Lambard, 2 East, 575.
6. Assignee of Lessee v. Lessor.
7. Assignee of Reversion v. Assignee of Lessee; Barker v. Damer, Carth. 182. Salk. 80.
8. Assignee of Lessee v. Assignee of Reversion.

The circumstance of rent being made payable in a different county from that in which the lands lie, will not affect the locality of an action of covenant for non-payment of such rent¹.

It is to be observed, however, that where the action is local^a, although it be brought and tried in a wrong county, yet the defect will be aided after verdict, by stat. 16 & 17 Car. 2. c. 8.

It must appear on the face of the declaration^a, that defendant covenanted by deed; for where plaintiff declared, that defendant *per quoddam scriptum suum factum apud Westminster concessit*, &c. it was holden bad; because scrip-

¹ Barker v. Damer, Salk. 80.

^a Mayor of London v. Cole, 7 T. R. 583.

ⁿ Moore v. Jones, Str. 814. See also Southwell v. Brown, Cro. Eliz. 571.

(45) If the deed bears date in a foreign country, it must be so stated in the declaration, and the venue must be added under a scilicet, for a place of trial.

tum did not import a deed, and *factum* being joined to *apud Westminster*, rendered it impossible to be taken as a substantive (46).

As this action is brought on a deed*, with the execution of which defendant is charged, plaintiff must make a profert of the deed in the declaration, and bring the deed into court, in order that the court may see whether it be executed according to law. Profert being made, defendant is entitled to crave oyer, and the court cannot then dispense with oyer, although plaintiff make an affidavit, that he has searched for the deed, and cannot find it any where (47).

Every deed is supposed to be executed the same day that it bears date^p. But though the deed appear on the face of it to have been made, that is, written on one day, yet if in truth it were delivered on a subsequent day, that may be shewn by averment.

A declaration in covenant stated that the deed was *indented, made, and concluded*^q, on a day subsequent to the day on which the deed itself was stated on the face of it to have been *indented, made, and concluded*; it was holden, that such allegation was no more inconsistent with the deed, than if it had been alleged that it was sealed and delivered

o Thoresby v. Sparrow, B. R. E. 16 Geo. 2. 1 Wils. 16. 2 Str. 1186. S. C. p Stone v. Bale, 3 Lev. 348. See also Goddard's case, 2 Rep. 4. b. q Hall v. Cazenove, 4 East's R. 477.

(46) Reynolds J. said, that it had been holden well enough to call it *factum, indentura, scriptum indentatum*, because they implied the circumstances of sealing and delivering.

(47) In Read v. Brookman, 3 T. R. 151. in a plea in bar to an avowry, plaintiff, instead of making a profert, pleaded that the deed was lost by time and accident. On special demurrer this averment was holden good, per Kenyon C. J., Ashhurst J., and Buller J.—Grose J. *dissentiente*; but, in pleading a lost deed, it is necessary to set forth the supposed names of the parties to the deed and the date. Hendy v. Stephenson, 10 East, 55. If the deed has been destroyed by fire, it may be so alleged as an excuse for the non-production of it, as in Routledge v. Burrell, 1 H. Bl. 254. where the plaintiff declared that by a certain deed poll made, &c. (which said deed poll was casually burnt and destroyed by the fire therein after mentioned). But if profert be made in the declaration, the deed must be produced; for the plaintiff, so declaring, will not be permitted to give evidence of the destruction of the deed, or of its being in the hands of the defendant. Smith v. Woodward, 4 East's R. 585.

on a day subsequent; that it was quite immaterial when it was *indented* and equally so when it was *made*, by which might be understood when it was *written*; the only material word was *concluded*, and a deed could only be said to be *concluded* when it was delivered. The time of delivering was the important time when it took effect as a deed; and from the preceding case of *Stone v. Bale*, it appeared that the delivery might be after the date.

In framing the declaration, it is not necessary to set forth the provisions of the deed *in letters and words*. It will be sufficient to state *the substance and legal effect*. Neither is it necessary to set forth *all* the provisions of the deed; stating such parts as are necessary to entitle the plaintiff to recover will be sufficient (48).

Hence in covenant on a mortgage deed^r, the court were of opinion, that it was sufficient for the plaintiff to set forth in his declaration, that defendant, by a certain indenture, had demised certain premises therein mentioned (not specifying the premises) subject, among other things, to such a proviso; then setting out the substance of the covenant for the payment of the money, and breach for the non-payment.

If the deed on which plaintiff declares contain a proviso^d, operating by way of defeasance of the covenants, the plaintiff is not obliged to state such proviso in his declaration; if the defendant means to rely on it, it is incumbent on him to shew it.

It is sufficient to say, "*whereas* by a certain indenture,

^r *Dundas v. Lord Weymouth*, Cowp. 665. ^d *Elliott v. Blake*, 1 Lev. 88. T. Raym. 65. S. C.

(48) This rule ought to be strictly adhered to, as well to prevent the extension of the record to an unreasonable length, as to avoid the danger resulting to the party setting forth the deed, from variances and formal objections. In *Dundas v. Lord Weymouth*, Cowp. 665. the court said, they would animadvert upon any future instance of putting parties to the enormous expense of setting out deeds at length, or superfluous parts of them. And in *Price v. Fletcher*, Cowp. 727. where the plaintiff in an action for breach of covenant for quiet enjoyment under a lease, had set out the whole lease *verbatim*, it was referred to the master to strike out the superfluous matter in the declaration, *with costs*. See 1 Willms's. Saunders, 233. n. (2). where the learned serjeant has given a concise form of declaration in covenant for non-payment of rent,

&c. it is witnessed, &c." without a direct affirmation^t, that by such an indenture defendant covenanted (49).

In covenant by husband of reversioner in fee^u, he must declare on a seisin in fee in himself *and his wife*, in right of his wife. If he state that he is seised of the reversion in his demesne as of freehold, it will be bad on special demurrer.

Of the Breach.—The breach assigned ought to be co-extensive with the import and effect of the covenant: but, where the covenant is general^x, the breach may be assigned as generally as the covenant; and it is sufficient, if it negative the words of the covenant: as where, on a covenant in an indenture of lease, that defendant had full power and lawful authority to demise, the breach assigned was, that defendant, at the time of making the said indenture, had not full power and lawful authority to demise the premises according to the form and effect of the indenture: after verdict for plaintiff, and judgment in B. R. on error in the Exchequer Chamber, it was objected, that it was not stated in the declaration, who had title to the premises at the time of making the indenture; but it was resolved, that the assignment of the breach was good; because it had pursued the words of the covenant *negative*; and that it lay more properly in the notice of the lessor what estate he himself had in the land, than in the lessee, who was a stranger to it; and therefore defendant ought to have shown what estate he had in the land at the time of the demise, whereby it might have appeared to the court, that he had full power and authority to demise.

So where in covenant^y, the declaration stated, that plaintiff by indenture let to defendant's testator a house for years, and the lessee covenanted to repair it well from time to time, during the term, and at the end of the term to leave the same well repaired; and the breach assigned was, that the lessee did not leave it well repaired at the end of the

^t *Buttivant v. Holman*, adjudged on error from C. B. in B. R. T. 17 Jac. Cro. Jac. 537.

^u *Polyblank v. Hawkins*, Dougl. 328.

^x *Salmon v. Bradshaw*, 9 Rep. 60. b. Cro. Jac. 304, S. C. See also to the same effect, *Muscot v. Ballet*, Cro.

Jac. 369. *Brigstock v. Stannion*, Ll. Raym. 106. *Procter v. Bardet*, 3 Lev. 170. 3 Mod. 69. S. C. *Boscawen v. Cook*, 1 Raym. 107. *Rawlin v. Vincent*, Carth. 124.

^y *Hancock v. Field and others*, executors of *Crouch*, Cro. Jac. 170, 171.

(49) The court said, that there was a difference between declarations and bars in this respect; for in the declaration, "it is witnessed," was sufficient to induce the action and assign the breach.

term: an exception was taken, because the declaration did not shew in what point the house was not well repaired; but it was overruled; for, the breach being according to the covenant, it was sufficient; but if the defendant had pleaded, that at the end of the term he delivered it up well repaired, then, if the plaintiff will assign any breach, he ought particularly to show in what point it was not well repaired, so as the defendant might give a particular answer thereto.

In covenant by a master against his servant^a, on a covenant not to buy or sell without the master's leave, within two years; the breach assigned was, that defendant had *diversis diebus & vicibus*, between such a day and such a day, sold to H., and to several other persons unknown, goods to the value of 100*l*. Issue upon this, and, after verdict for plaintiff, it was moved in arrest of judgment, that the breach was uncertain as to the times and persons; Holt C. J. said, that in *covenant* (50) it was sufficient if a general breach was assigned; and that the breach in question was certain enough; for it was so described, that if another action were brought, the defendant might plead a former recovery for the same cause, and aver this to be the same selling. Gould J. agreed, that the action being only for damages, it was well enough. Judgment for plaintiff.

Plaintiff declared that defendant covenanted to allow plaintiff 2*s*. for every quire of paper he should copy^a, and assigned for breach, that he copied four quires and three sheets, for which 8*s*. and 3*d*. was due, which defendant had not paid. On writ of error after verdict, and judgment for plaintiff in C. B., it was moved, that there could not be any apportionment in this case, for the covenant was to allow plaintiff 2*s*. for copying a quire, but not *pro rata*, for which cause the judgment was reversed. But it seems that on demurrer this objection would not avail the defendant, because in that case the plaintiff might remit his claim for the odd sheets, and enter up judgment for the residue, in conformity to the rule laid down in *Inclendon v. Crips*, Salk. 658. recognised in *Buckley v. Kenyon*, 10 East, 143. and *infra*, that where the sum demanded does not depend on the deed itself, but upon matter extrinsic, there may be a remit-

^a *Farrow v. Chevalier*, Salk. 139. cited ^a *Needler v. Guest*, Aleyn, 9.
8 East, 84. 8 T. R. 459.

(50) Secus in debt on bond to perform covenants, and debt for a penalty on a statute; there a precise breach must be shewn. Lord Raym. 107.

titur; because the variance is not inconsistent with the deed.

In covenant the breach assigned was for non-payment of rent on different days^b, *which amounted to a certain sum*, and the plaintiff had made a mistake in calculating the sum, it was holden good; because in this action the whole shall be recovered in damages, and the plaintiff shall not have damages according to his summing, but according to the matter.

The plaintiff declared on an indenture of demise for years of certain coal-mines^c, reserving a fourth part of the coal raised, or its value in money, at the election of the lessor; but if the fourth part fell short of the annual value of 400*l.* then reserving such additional rent as would make up that annual sum, to be rendered on the first day of every month in each year of the term, by equal portions; and that the plaintiff elected to be paid in money: the breach assigned was, that 900*l.* of the rent reserved for two years and *three months* was in arrear. On general demurrer, it was objected, that the rent being reserved yearly, the breach was not well assigned, inasmuch as it included a fraction of a year; but the court overruled the demurrer, observing, that it could not be sustained on the construction of the covenant; for, though it spoke of an annual sum of 400*l.* to be made up in case the proportion of coal reserved should fall short of that sum, yet the rent was to be rendered monthly. But, even admitting it to be a yearly rent, the excess for the three months might be remitted, and judgment given for the residue; and Bayley J. cited *Inclendon v. Crips*, Salk. 658. and 2 Lord Raym. 814. as an authority in point as to the remittitur.

Where lessee covenanted for himself and his assigns to plant a certain number of trees every year^d, and the breach was, that defendant had neglected to do it; it was holden sufficient, without negating that his assigns had done it, for the court will not intend an assignment.

As to the necessary averments in actions for breach of covenant, for quiet enjoyment, see ante, Sect. III. 6.

I shall now proceed to explain the nature of dependent covenants and conditions precedent, concurrent acts or covenants, and mutual or independent covenants, subjoining to each division such cases as appear to afford the best ill-

^b *Farrer v. Snelling*, 1 Roll. Rep. 335.

^c *Buckley v. Kenyon*, 10 East, 129.

^d *Gyse v. Ellis*, Str. 228.

illustration of the subject under consideration. And first, of dependent covenants and conditions precedent.

Conditions precedent.—If A. covenants to do, or to abstain from doing, a certain act, in consideration (51) of the prior performance of some act or covenant on the part of B., A.'s covenant is termed a dependent covenant, because B.'s right of suing A. for a breach of this covenant *depends* upon the prior performance, or that which the law considers as equivalent to performance of the act or covenant to be performed by B., and the prior act or covenant, on the part of B., being in the nature of a condition precedent, is technically termed a condition precedent, the performance whereof must be shewn by B., in order to entitle him to recover damages against A. (52).

The following cases will illustrate the nature of a dependent covenant and condition precedent, and the reader may collect from them the rules by which the courts have guided their decisions on this subject.

The plaintiff declared^c, that defendant by deed poll (53) agreed with the plaintiff, that he, defendant, would accept of the plaintiff a quantity of South Sea stock, so soon as the receipts should be delivered out by the company, and would pay for the same such a sum on a certain day, next after the date of the deed, and then averred that defendant did not pay the money at the day; on general demurrer, because the plaintiff had not averred an assignment of the stock, or a tender, Pratt C. J. delivering the opinion of the court, said, that the intent of the parties appeared to be, that one should have the money, and the other the stock; and

^c Lock v. Wright, Str. 569.

(51) It is not necessary that it should be stated in terms to be "in consideration of;" if the manifest intention be so, it is sufficient.

(52) It may be remarked, that if the act, undertaken to be done, is dispensed with by the other party, it is sufficient so to state it on the record. Per Buller J. in *Hotham v. East India Company*, Doug. 278. See an averment to this effect in *Jones v. Barkley*, Doug. 684.

(53) In Strange's statement of the case, p. 569. it is said to have been by writing indented; but it is evident from the reasoning of the court, even in Strange (see p. 571.), that it was a deed poll. See also S. C. 8 Mod. 40. where it is expressly stated to have been an action of covenant on a deed poll.

not that either should perform his part of the agreement, and lay himself at the mercy of the other for the equivalent; that this was not a covenant entered into by both parties, upon which each would have his mutual remedy, but it was the deed poll of the defendant only; and, therefore, though upon delivery or tender of the stock, the plaintiff would have his remedy for the money, yet the defendant, on the other side, upon payment of the money, would not have any remedy to compel the delivery of the stock, and therefore he should not be obliged to pay the money until the consideration for which it was payable was performed: that the word *pro* would be either a condition precedent or subsequent, as would best answer the intent of the parties; and in this case it must be a condition precedent, because otherwise the intention of the defendant to have the stock for his money, could never take effect. Judgment for defendant (54).

In covenant against a lessee for not repairing^f, the declaration stated, that by indenture the defendant covenanted to repair the demised premises, and at the end of the term to surrender up the same in good repair, the lessor (the plaintiff) finding timber sufficient for such repairs: the breach assigned was for not repairing; the defendant pleaded, that the plaintiff did not find timber sufficient: on demurrer, it was adjudged, that the finding the timber was a thing in its nature necessary to be done first, and therefore a condition precedent, the performance of which ought to have been averred in the declaration.

So where in a covenant on an indenture of lease for seven years, for non-payment of rent^g, it appeared that the lease contained the usual covenants, that the lessee should pay rent, repair, &c., and a proviso, that if the lessee, at the end of the first three or five years, should be desirous of quitting, and should give six months notice thereof, before the expiration of the first three years, then, from and after the expiration of the first three years, and payment of all rents, and performance of the covenants on the part of the lessee,

^f Thomas v. Cadwallader, Willes, 496.

^g Porter v. Shepherd, B. R. E. 36

Geo. 3. affirming judgment of C. B. 6 T. R. 66s.

(54) Pratt C. J. observed also, that the difference between a mutual covenant and a deed poll was taken and allowed in *Portuge v. Cole*, 1 Saund. 320. where the court were of opinion that the defendant had his remedy; "otherwise (says the book) it would have been, if the deed had been the words of the defendant only."

the indenture should be void; it was holden, that the payment of rent, and performance of the other covenants, by the lessee, were conditions precedent to the lessee's determining the term at the end of the first three years, and that merely giving six months notice, expiring with the first three years, was not sufficient for that purpose; Lord Kenyon C. J. observing, that it had frequently been said, and common sense seemed to justify it, that conditions were to be construed to be either precedent or subsequent, according to the fair intention of the parties, to be collected from the instrument; and that technical words, if there were any to encounter such intention, (and there were not in this case) should give way to that intention: that it was impossible to read this lease, without seeing, that the parties intended, that the tenant should do every thing required of him, before he could put an end to the lease.

So where by a policy of assurance against fire it was stipulated^a, that the assured sustaining any loss by fire should procure a certificate of the minister, churchwardens, and of some reputable householders of the parish, importing that they knew the character of the assured, and believed that he had sustained the loss by misfortune, and without fraud: it was holden, that the procuring such a certificate was a condition precedent to the right of the assured to recover, and that it was immaterial, that the minister and churchwardens wrongfully refused to sign the certificate; Lawrence J. observing, that the cases were uniform to shew, that if a person undertakes for the act of a stranger, that act must be done (55). See *Routledge v. Burrell*, 1 H. Bl. 254. and *Oldham v. Bewicke*, 2 H. Bl. 577. n. (a) to the same effect.

So where in covenant on a charter party¹, to recover the value of a ship against defendant, to whom she had been let to freight, for the purpose of carrying government stores to America, the declaration stated a covenant, that "if the ship were taken during the time she was in his Majesty's

^a *Worsley v. Wood*, in error from C. B. B. R. T. 26 Geo. 3. 6 T. R. 710.

¹ *Davis v. Mure*, B. R. M. 22 Geo. 3. cited in argument in *Hotham v. East India Company*, 1 T. R. 642.

(55) If A. be bound to B. to pay ten pounds to C., A. tenders to C. and he refuseth, the bond is forfeited. 1 Inst. 208. b. If a man be bound in an obligation, with condition to enfeoff B. (who is a mere stranger) before a day, the obligor doth offer to enfeoff B., and he refuseth, the obligation is forfeit, *for the obligor hath taken upon him to enfeoff him*, and his refusal cannot satisfy the condition, because no feoffment is made. 1 Inst. 209. a.

service, and it should appear to a court-martial that the master and ship's company had made the utmost defence they were able, the value of the ship should be paid by the defendant;" and then averred a capture, the master and ship's company having made the utmost defence they were able, and that it would have appeared to a court-martial, &c. if the defendants had thought proper to have had an inquiry made in that respect by a court-martial. The defendant pleaded, that it hath not appeared, &c. On demurrer to the plea, the court gave judgment for the defendant, observing that the charter party annexed an express condition, that it should appear to a court-martial, &c. and therefore the plaintiff was bound to shew that it had appeared, or that it arose from the fault of the defendant that it had not.

So where in covenant on a charter party of affreightment^h, whereby the plaintiff let his ship to the defendant to freight from Liverpool to W., and back to Liverpool, and agreed that the master should take on board a cargo of salt to W., and after delivering the same there, should take on board there a cargo of deals; in consideration of which the defendant agreed to pay to the plaintiff, "in full for the freight for the said voyage, at the rate of so much per standard hundred for deals *delivered at Liverpool*, &c.; the freight to be paid one fourth in cash on her arrival, and the remainder by an acceptance on London at four months' date." The declaration then averred, that the ship, after carrying the cargo of salt to W., took on board there a cargo of deals, &c. and proceeded on her voyage towards Liverpool, &c., and whilst the ship was so proceeding, &c., and after she had performed a great part of her voyage, but before her arrival at Liverpool, on &c., the ship was, by the force of the winds and waves, wrecked, and thereby became incapable of proceeding any farther on the voyage, by reason whereof the deals were obliged to be put on shore for the preservation thereof; "which said deals, so unladen, the defendant afterwards accepted, and sold the same to his own use, whereby he became liable to pay to the plaintiff a proportionable part of the freight for the carriage of the said deals from W. to Liverpool, &c.;" with an averment that a proportionable part amounted to such a sum. And the breach assigned was in the non-payment of that sum. The defendant pleaded, that no part of the cargo of deals was delivered at Liverpool, according to the form and effect of the said charter-party. On special demurrer to the plea, assigning for cause, that the defendant had not confessed and avoided or denied the matter al-

leged in the declaration, but had attempted to put in issue collateral matters, it was holden that the plea was good; Lawrence J. observing, that when a ship is driven on shore, it is the duty of the master either to repair his ship, or to procure another, and having performed the voyage, he is then entitled to his freight; but he is not entitled to the whole freight, unless he perform the whole voyage, except in cases where the owner of the goods prevents him; nor is he entitled *pro rata*, unless under a new agreement. Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties (56); but here the plaintiff has resorted to the original agreement, under which the defendant only engaged to pay in the event of the ship's arrival at Liverpool. That event has not happened, and therefore the plaintiff cannot recover in this form of action.

From the preceding cases it may be collected, that wherever there is a condition precedent on the part of the plaintiff, performance, or that which is equivalent to performance (57), must be alleged and proved, otherwise the action cannot be supported; and, consequently, the defendant may plead non-performance of the condition precedent in bar of the plaintiff's action; or, if the averment of

(56) The principal cases on the subject of apportionment of freight are, *Lutwidge v. Grey*, D. F. 23 Feb. 1733.—*Luke v. Lyde*, 2 Burr. 882. and 1 Bl. R. 190.—*Baillie v. Modigliani*, Park's Ins. 53.; but not reported elsewhere. These three cases are stated at length in Mr. Abbott's book on Shipping. The case of *Luke v. Lyde* was much commented upon in *Cook v. Jennings*, 7 T. R. 381. and in *Mulloy v. Bucker*, 5 East, 316. See further on the same subject *Ward v. Felton*, 1 East, 507.—*Hunter v. Prinsep*, B. R. M. 49 G. 3. 10 East, 378.—*Liddard v. Lopes*, B. R. H. 49 G. 3. 10 East, 526.—*Ritchie v. Atkinson*, post n. (59). *Christy v. Row*, 1 Taunt. 300.

(57) "Where a person, by doing a previous act, would acquire a right to a debt or duty; by a tender to do the previous act, if the other party refuse to permit him to do it, he acquires the right as completely as if it had actually been done." Arg. *Jones v. Barkley*, Doug. 685. cited by Lord Ellenborough C. J. delivering the judgment of the court in *Smith v. Wilson*, 8 East, 443. So if the plaintiff has been discharged by the defendant from the performance of the condition, the action may be maintained. See *Jones v. Barkley*, Doug. 684. So where the plaintiff has been prevented from the performance by the neglect and default of the defendant. 1 T. R. 645.

performance be entirely omitted, or imperfectly made (58) the defendant may take advantage of it on demurrer.

The reader who is desirous of pursuing this branch of the subject further, is referred to the analogous cases under tit. Assumpsit, ante p. 102—106. To the cases there abridged, the following may be added: *Hesketh v. Gray*, Say. 185.—*Collins v. Gibbs*, 2 Burr. 899.—*Campbell v. French*, 6 T. R. 200. See also *Smith v. Wilson*, 8 East, 437.

Having thus endeavoured to illustrate the nature of conditions precedent, I shall proceed to the next object of consideration, viz. concurrent acts or covenants.

Concurrent Acts.—Where reciprocal acts or covenants are to be performed by each party at the same time, they are technically termed concurrent acts or covenants; and in this case, as well as in the case of dependent covenants, one party cannot maintain an action against the other, without averring performance, or that which is equivalent to performance, of the acts or covenants to be performed on the plaintiff's part.

As where in covenant, the declaration stated¹, that by articles of agreement under seal, the plaintiff covenanted to convey to the defendant, on or before the 1st of August, 1797, a school-house and ground; and on or before the 24th June, 1796, to surrender up the premises, and deliver over the scholars to the defendant; and, in consideration thereof, the defendant covenanted to pay the plaintiff a sum of money, on or before the 1st of August, 1797, with interest from the 1st January next preceding the said 1st August; the plaintiff then averred, that he surrendered up the premises to defendant on the 24th June, 1796, and delivered over the scholars; and, although the plaintiff had well and truly performed every thing contained in the articles on his part, yet defendant had not paid the money and interest. The defendant pleaded that he was ready to accept a conveyance of the premises, and at the same time to pay the money to the plaintiff, if he would have made such a conveyance, but the plaintiff did not, on or before the first of August, or at any time since, convey the premises to defendant. On demurrer, it was holden, that as the substance of the consideration

¹ *Glazebrook v. Woodrow*, B. R. M. 40 Geo. 3. 3 T. R. 266. cited for plt. in 2 Bos. & Pul. N. R. 236.

(58) As to what will be a sufficient averment in this respect, see *Jones v. Barkley*, Doug. 684.

to entitle the plaintiff to receive the money, was the making the conveyance, payment of the money could not be enforced, until the conveyance was made, or at least offered to be made by the plaintiff; Lawrence J. observing, that nothing could be inferred in favour of the plaintiff in this case from part execution of the contract; because, though the defendant was to be put in possession in June, 1796, and the money was to be paid in August, 1797, yet as that also was the time fixed for the execution of the conveyance, it was plain, that the defendant did not intend to part with his money until his title was secure.

So where A. covenanted that he would, on or before a certain day^m, convey land to B., by such conveyance as B.'s counsel should advise; in consideration of which B. covenanted to pay A., at or upon the execution of the conveyance, a certain sum of money; it was holden, that A. could not maintain covenant against B. for non-payment of the money, without shewing that he had conveyed, or that he was ready at the day to have conveyed, what he had covenanted to do, and that he had done every thing which lay upon him to do for that purpose, but that he was prevented from so doing by some act, or omission, or neglect, on the part of the defendant.

Mutual and independent Covenants.—Where covenants are mutual and independent, one party may maintain an action against the other for a breach of his covenants, without averring a performance of the covenants on his, the plaintiff's part; and the defendant cannot plead non-performance of such covenants on the part of the plaintiff in bar of the plaintiff's actionⁿ.

In covenant on articles of agreement^o, whereby the plaintiff, who was master of a vessel, covenanted to make use of the same in the coal trade, for the defendant's service; and, among other things, covenanted that during twelve calendar months (the time the vessel was hired for) he would pay all seamen's wages yearly; in consideration whereof, the defendant covenanted to pay the plaintiff 4*l.* every month during the year; the non-payment whereof was the breach assigned. To this the defendant pleaded, that the plaintiff did not pay the seamen according to his covenant; on demurrer to this plea, it was insisted by the plaintiff, that these were mutual covenants, and that though the words were "in consideration thereof," yet in the nature of the thing, this

^m *Heard v. Wadham*, 1 East, 619.
ⁿ *Dawson v. Myer*, Str. 712.

^o *Russon v. Coleby*, T. 7 Geo. 2. B. R. 7 Mod. 226. Leach's edit.

could not be a condition precedent; for the payment of the seamen, by the plaintiff, was to be yearly; of the plaintiff, by the defendant, monthly; so that from the manner of covenanting, it was impossible the performance of the act to be done by the plaintiff should be necessary to entitle him to an action against the defendant for not doing the act he had covenanted to do; and the case of *Thorp v. Thorp* was cited, where this distinction is taken by Holt C. J. in the resolution of that case; Judgment for the plaintiff; Lord Hardwicke C. J. observing, that there could not be any condition precedent here for the reason given; and the resolution in *Thorp v. Thorp* was certainly good law; for these cases did not depend so much on the manner of penning the covenants, as the nature of them.

It was agreed, between plaintiff and defendant^p, by indenture, that in consideration of 500*l.* plaintiff should instruct defendant in bleaching materials for making paper, and permit defendant, during the continuance of a patent, which plaintiff had obtained for that purpose, to bleach such materials according to the specification. In pursuance of this agreement, the plaintiff, in consideration of 250*l.* paid, and of the further sum of 250*l.* to be paid, to the plaintiff, in the manner herein after mentioned, covenanted that he would, *with all possible expedition*, instruct the defendant, in the manner of bleaching the materials. The defendant, in consideration of the plaintiff's covenants, covenanted that he would, on or before the 25th of February, 1794, or sooner, in case plaintiff should before that time have sufficiently taught defendant in bleaching the materials, pay the plaintiff the further sum of 250*l.* In covenant on the preceding agreement the breach assigned was, the non-payment of the 250*l.* Special demurrer, that it was not averred that plaintiff had instructed defendant in the manner of bleaching the materials. Lord Kenyon C. J. delivering the opinion of the court, said, that whether these kinds of covenants be or be not independent of each other, must certainly depend on the good sense of the case. If one thing is to be done by a plaintiff before his right of action accrues on defendant's covenant, it should be averred, in the declaration, that such thing was done. "Where there are mutual promises, yet if one thing be the consideration of the other, there a performance is necessary, *unless a day is appointed for performance.*" Per Holt C. J. Salk. 113. "If a day be appointed for the payment of the money, and the day is to happen before the thing can be

^p *Campbell v. Jones*, B. R. H. 36 Geo. 3. 6 T. R. 57a.

performed, an action may be brought for the payment of the money, before the thing be done," *ib.* 171. Upon the authority of these cases, the judgment of the court must be in favour of the plaintiff, if, upon the true construction of the deed, a certain day be fixed for the payment of the money, and the thing to be done may not happen until after. The plaintiff in this case covenants *with all possible expedition, not by any fixed time*, to instruct the defendant, and in consideration of the plaintiff's covenants, the defendant covenants, that he will, on or before the 25th day of February, or sooner, in case the plaintiff should before that time have instructed the defendant, pay him the further sum of 250*l.* The intent of the parties appears to be that the payment might be accelerated, but should not in any event be delayed. Judgment for plaintiff. N. In a subsequent case, in 8 T. R. 370. Kenyon C. J. speaking of the preceding case of *Campbell v. Jones*, said "The instruction to be given was not to be, and could not in the nature of the thing be, performed at the same time with the payment of the money by the defendant, for which a certain time was limited, whereas no time was limited for giving the instruction;" and Lawrence J. in the same report, p. 374. observing on this case, said, "that the instruction might, consistently with the plaintiff's covenant, as well be given after as before the time specified for the payment of the money; and, therefore, it was not necessary to be averred in an action to recover the money" (59).

(59) I cannot dismiss the consideration of this subject, without taking notice of a class of cases, in which this principle has been established; viz. that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for a breach of which the party injured may be compensated in damages. The first of this class is the case of *Boone v. Eyre**, which was stated by Lawrence J. in *Glazebrook v. Woodrow*, 8 T. R. 373, as follows. The plaintiff had sold to the defendant an estate in Dominica, with the negroes, under the usual covenants for a good title, quiet enjoyment, and further assurances, in consideration of a sum in gross, and a certain annuity for lives, which the defendant covenanted to pay, "he, the plaintiff, well and truly performing all and singular the covenants, clauses, recitals, and agreements, in the said indenture of sale contained:" and, in bar to an action of covenant for the arrears of the annuity, besides assigning breaches of specific and partial covenants, the defendant by his fourth plea, pleaded, "that the plaintiff, at the

* Reported, but imperfectly, in 2 Bl. R. 1312. and 1 H. B. 273. n.

For a further illustration of this branch of the subject, see *Blackwell v. Nash*, Str. 535.—*Wyvill v. Stapleton*, Str. 615.—*Martindale v. Fisher*, 1 Wils. 88. and ante, p. 109.

time of making the said indenture, had not in himself full power, true title, and good and lawful authority, to bargain, sell, and release the said plantation and negroes, &c. in manner and form as in the said indenture mentioned." The court said, it would be strange if such a defence were to be allowed, when, if any one negro on the plantation were proved not to have been the property of the plaintiff, it would bar his action for the annuity. Lawrence J. having thus stated the case, proceeded to observe, that the judgment of the court went on the ground that, in the form the breaches were assigned, *the plea did not necessarily go to the whole of the consideration*: but if the plea had been, that the plaintiff had not any title to the plantation, he did not know, that it would not have been held sufficient. Le Blanc J. observing upon the same case, said, "The substantial part of the agreement being the conveyance of the property in respect of which the annuity was to be paid, the court held it to be no answer to an action for the annuity, to say, that the plaintiff had not a good title in some of the negroes, which were upon the plantation; *because all the material part of the covenant had been performed*; and the plaintiff had a remedy upon the covenant for any special damage sustained for the non-performance of the rest;" 8 T. R. 375. The case of *Boone v. Eyre* was recognized by Lord Kenyon, in delivering the opinion of the court, in *Campbell v. Jones*, 6 T. R. 572, 573. and stated to be another ground for giving judgment for the plaintiff in that case. And, in the case of *Hall v. Cazenove*, B. R. H. 44 Geo. 3. 4 East's R. 483, 484. Lawrence J., having stated *Boone v. Eyre* at length, applied the principle of the decision to the case then before the court. The doctrine laid down by Ld. Mansfield, in *Boone v. Eyre*, 1 H. Bl. 273. n. and 6 T. R. 573., viz. "that where mutual covenants go to the whole of the consideration, on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a part, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent;" was relied on in *Ritchie v. Atkinson*, 10 East, 295. There the master and the freighter of a vessel of 400 tons mutually agreed in writing, that the ship, being every way fitted for the voyage, should with all convenient speed proceed to Petersburg, and there load, from the freighter's factors, a complete cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight for hemp £5 per ton, for iron 5s. a ton, &c.; one half to be paid on right delivery, the other at three months. It was holden, that the delivery of a complete cargo was not a condition precedent, but that the master might recover freight for a short cargo delivered in London at the stipulated rates per

See also *Boone v. Eyre*, 2 Bl. R. 1312. and *Terry v. Duntze*, 2 H. Bl. 389.

It remains only to add a similar observation to that which was made at the close of the third section, tit. Assumpsit, ante, p. 109. viz. that there are not any precise technical words required to constitute a condition precedent, or a dependent or independent covenant. Whether a condition be precedent or subsequent, or a covenant be dependent or independent, must be gathered from the words and nature of the agreement, which is to be construed according to the intention of the parties, as far as that can be collected from the instrument; and, however transposed the covenants may be^q, their precedence must depend on the order of time in which the intent of the transaction requires the performance. When it is once established, that the stipulation of one party is a condition precedent to the performance of the covenant by the other party, it follows as a necessary consequence, that an action cannot be maintained unless performance, or that which the law considers as equivalent to performance, be averred and proved. But where a right of action is once vested in the plaintiff^r, liable, however, to be divested by the non-performance of a condition subsequent, that is matter of defence only, and must be shewn by the defendant.

^q Per Lord Mansfield C. J. in *Kingston v. Preston*, Doug. 690. ^r *Hottham v. East India Company*, 1 T. R. 638.

ton, the freighter having his remedy in damages for such short delivery. In *Havelock v. Geddes*, B. R. 10 East, 555. the authority of *Boone v. Eyre* was recognised by Ld. Ellenborough C. J. delivering the judgment of the court. And in *Davidson v. Gwynne*, 12 East, 389. where freight was covenanted to be paid in consideration of several things, one of which was the sailing with the first convoy; it was holden, that as the object of the contract was the performance of the voyage, which in this case had been performed, the sailing with the first convoy was not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured might be compensated in damages. It was holden also in the same case, that the covenant for the right and true delivery of the goods was satisfied by the delivery of the entire number of chests, and that the deteriorated state of their contents afforded no answer to this action for the recovery of the freight, the defendant having a cross action to recover damages for that.

VII. *Of the Pleadings,*

1. *Accord and Satisfaction.*
2. *Eviction.*
3. *Infancy.*
4. *Levied by Distress.*
5. *Nil habuit in tenementis.*
6. *Non est factum.*
7. *Non infregit conventionem.*
8. *Performance.*
9. *Release.*
10. *Set-off.*

1. *Accord and Satisfaction.*

ACCORD with satisfaction is a good plea in discharge of damages for covenant *broken* (60).

In covenant against an assignee for not repairing a house, the defendant pleaded accord between him and the plaintiff, and execution thereof, in satisfaction and discharge of the want of repairs; on demurrer, it was objected, that this action of covenant was founded upon the deed, which could not be discharged except by matter of as high a nature, and not by any accord or matter in *pais*; but it was resolved by the court, that the plea of the defendant was good; and this distinction was taken: where a duty accrues by the deed, and is ascertained at the time of making the writing, as by covenant, bill, or bond, to pay a sum of money; in that case, the duty, which is certain, takes its essence and operation originally and solely by the writing, and therefore it must be avoided by matter of as high a nature, although the

cf *Blake's case*, 6 Rep. 43. b. Cro. Jac. 99. S. C. by the name of *Alden v. Blague*.

(60) In *Snow v. Franklin*, Lutw. 358. to covenant for non-payment of rent, the defendant pleaded accord with satisfaction of the covenant, before any breach. The plea was holden bad on demurrer. See also *Kaye v. Waghorn*, 1 Taunt. 428. S. P.

duty be merely in the personalty^t (61). *But* where no certain duty accrues by the deed, but *a wrong or subsequent default*, together with the deed, gives an action to recover damages, which are only in the personalty, for such wrong or default, accord with satisfaction is a good plea, as in this case, the covenant does not give the plaintiff, at the time of making it, any cause of action; but the tort or default in not repairing the house, together with the deed, gives an action to recover damages for the want of reparation. The action is not founded merely on the deed, but on the deed and the subsequent wrong; which wrong is the cause of action, and for which damages shall be recovered; and in every action where compensation is demanded, by way of damages only, accord executed is a good bar.

The plaintiff being seised in fee of a messuage and lands^u, one parcel of which, consisting of about one-third, lay contiguous to the land of one E. P., in consideration of a sum of money, and the covenant herein-after mentioned, by indenture released the said parcel of land to E. P. in fee, who thereupon covenanted for herself and her assigns, that she would, from time to time, and at all times thereafter, pay one-third part of all the taxes and assessments that should be imposed on the said messuage and land: the parcel of land came to the defendant by assignment, who neglected to pay the one-third part of the taxes for several years. The plaintiff having declared for a breach of covenant, in the years 1759, 1760, 1, 2, 3, 4, 5, and 6, the defendant pleaded, that in Michaelmas Term, 1766, he commenced an action against the plaintiff and one R. J., for certain trespasses committed by them upon the lands and goods of the defendant; and, thereupon, afterwards, to wit, on the 22d January, 1767, it was agreed, (not saying by deed) that the defendant should put an end to his suit, and that plaintiff and R. J. should pay a certain sum of money, and costs; and that *the plaintiff should relinquish all damages and demands, which he then had against the defendant*; the plea then averred, that the defendant did not further prosecute his suit against the plaintiff and R. J., and prayed judgment of the action. On general demurrer to this plea, it was

^t See next case.

^u Rogers v. Payne, MSS. 2 Wils. 376. S. C. briefly stated.

(61) A collateral agreement by parol cannot be pleaded to invalidate a claim arising upon a deed. Hence to debt on bond, conditioned for the performance of an award, a parol agreement between the parties to wave and abandon the award cannot be pleaded, *Braddick v. Thompson*, 8 East, 344.

objected, that a covenant to pay money, which was by deed, could not be discharged without deed; and of this opinion was the court, and gave judgment for plaintiff. Blake's case, 6 Rep. 44 a. was cited.

Covenant by the heir in reversion^x against executor of tenant for life, for breach of covenant in testator, in not repairing the house demised; plea, that the testator, tenant for life, died on such a day, and that afterwards it was agreed, between the plaintiff and defendant, that defendant should quietly depart and leave possession to the plaintiff, and, in consideration thereof, the plaintiff agreed to discharge him from the breach; and averred, that within five days from the day of the agreement he left the house. On demurrer, the plea was holden to be bad; for the time was not fixed by the terms of the agreement, when the executor should depart; and, although it was averred that he departed within five days, yet that would not aid the first uncertainty; for the agreement was the foundation of the whole, which ought to be certain, when it should be performed.

2. Eviction.

To covenant for rent arrear, the lessee may plead^y, that he was evicted, by the lessor, from the demised premises, and kept out of possession until after the rent in question became due; for an *eviction* occasions a suspension of the rent; but a mere trespass will not: for where to covenant for rent arrear for a dwelling house^z, the defendant pleaded that the lessor had taken away a pent-house, fixed to the dwelling-house, and part of the demised premises; on demurrer, the court held that the fact stated in the defendant's plea being a mere trespass, for which the defendant might have a remedy by action, would not operate as a suspension of the rent (62).

^x Samford v. Cutcliffe, Yelv. 124. Russell v. Do., 3 Lev. 189.
^y Dalston v. Reeve, Ld. Raym. 77.

^z Roper v. Lloyd, T. Jones, 148. cited by Dunning, in Hunt v. Cope, Corp. 242.

(62) Although rent is suspended by an entry into part*, yet on a demise of a messuage with the appurtenances, the covenant to repair is not suspended by an entry into the back yard, the lessee remaining in possession of the messuage. Snelling v. Stagg, Bull. N. P. 165.

* Derrell v. Andrews, Hob. 190.

It is to be observed^a, that if a tenant would excuse himself from payment of rent upon an eviction by a stranger, he must shew that such stranger had a good title to evict him: and, in order to give the plaintiff a proper opportunity of controverting such title, the defendant must shew particularly how it arises; for, if it were sufficient to allege that the stranger had a good title, a single issue could not be taken on it; and as the legality, as well as the fact of the title, would be complicated together, the jury would be entangled with questions of law, which are proper for the consideration of the court only. To avoid this inconvenience, it is necessary that the title should be specified.

3. *Infancy.*

At the common law, infants are not bound by covenants which operate to their disadvantage. Hence a defendant may insist on his non-age, as a defence to an action of covenant: but this defence must be pleaded specially, and cannot be given in evidence on *non est factum*. The stat. 5 Eliz. c. 4. whereby infants are enabled to bind themselves apprentices, has not altered the common law as to the binding force of covenants entered into by infants, at least where the covenants are collateral covenants. This point appears to have been doubted formerly^b, but was fully established in the following case:

In covenant against an apprentice for departing from the plaintiff's service^c, without licence, within the time of his apprenticeship; the defendant pleaded, that at the time of making the indenture he was within age. On demurrer, judgment was given for the defendant; the court being unanimous, that, although an infant might voluntarily bind himself an apprentice, and, if he continued an apprentice for seven years, might have the benefit to use his trade; yet, neither at the common law, nor by stat. 5 Eliz. c. 4. did a covenant or obligation of an infant, for his apprenticeship, bind him; nor did any remedy lie against an infant upon such covenant (63).

^a Per Lord Hardwicke C. J. in *Jordan v. Twells*, B. R. M. 9 G. 2. MSS. and Ca. Temp. Hardw. 172.

^b *Fleming v. Pitman*, Winch, 63. Hutt. 63. S. C. E. T. 21 Jac.

^c *Gylbert v. Fletcher*, Cro. Car. 179. *Lilly's case*, 7 Mod. 15. S. P.

(63) See a dictum to the same effect, with the exception of special custom, in *Whittingham v. Hill*, Cro. Jac. 494. By the custom of London, an infant may bind himself by covenant in an indenture of apprenticeship. 2 Rol. R. 305. *Code v. Holmes*, Patm. 361. *Anon.* 1 Lev. 12. *Horn v. Chandler*, 1 Mod. 271.

4. *Levied by Distress.*

In covenant for non-payment of rent^d, the defendant cannot plead, *levied by distress*; because it amounts to a confession, that the rent was not paid at the time appointed; for the plaintiff could not have distrained, if the rent had not been in arrear at the day.

5. *Nil habuit in tenementis.*

If a lease be by indenture, the lessor and lessee are concluded from avoiding the lease: and if an action be brought, and the plaintiff declare on the indenture^e, and the defendant pleads that the lessor *nil habuit in tenementis*, the plaintiff, instead of replying the estoppel, may demur; because the estoppel appears on the record.

Covenant was brought by the assignee of a reversion for non-payment of rent^f: it was stated in the declaration, that J. P., on a certain day, was seised in fee, and on the same day demised by indenture to the defendant; that J. P. afterwards assigned the reversion in fee to the plaintiff. Plea, that before the demise and assignment of the reversion to the plaintiff, J. P. conveyed the premises to J. S. in fee, and traversed, that at any time after that conveyance J. P. was seised in fee. On general demurrer it was holden, that this plea was a special *nil habuit in tenementis*, which was no more to be allowed, where the demise was by indenture, than a general plea of that kind; and although the plaintiff was an assignee, yet he might take advantage of the estoppel, because it ran with the land.

In covenant by lessor on an indenture of lease for not repairing^g, the lessee pleaded, that the lessor had an equitable estate only in the thing demised: on special demurrer, the plea was holden bad.

It is an universal rule that a tenant shall not be permitted to set up any objection to the title of his landlord, under whom he holds: this is not a mere technical rule, but one founded in public convenience and policy. Hence a lessee of land in the Bedford level^h cannot object to an action by his landlord for a breach of covenant, in not re-

^d Hare v. Savil, 1 Brownl. 19. 2 Brownl. 273. S. C.

^e Palmer v. Ekins, Str. 818. 11 Mod. 411. Leach's ed. Ld. Raym. 1550. S. C.

^f Palmer v. Ekins, *ubi supra*.

^g Blake v. Foster, 8 T. R. 487.

^h Hodson v. Sharpe, 10 East, 350.

pairing, that the lease was void by the stat. 15 Car. 2. c. 17. for want of being registered. The act meant, for the protection of titles, that leases and conveyances, within this district, should be registered, that every person interested in the inquiry might know in whom the title to such land was; and, therefore, as against persons who have been deceived by the omission to register, or even as against those who, without being deceived, knew that the act had not been complied with, and relied on it, the legal objection might prevail at law; but not as between the parties themselves to the lease, between whom the act was not meant to operate.

Covenant for rent was brought on an indenture of lease^l, by the assignees of the lessor (a bankrupt); the defendant pleaded, that the lessor *nil habuit in tenementis*; it was holden bad, on general demurrer. In like manner, it has been adjudged^k, that an assignee of lessee under a lease by indenture cannot plead that the lessor did not demise.

It may be observed, that in the preceding cases, the want of title did not appear on the face of the declaration; and it seems that, in order to give a party the benefit of an estoppel, in all cases where it is necessary to set forth a title, a good title must appear on the face of the declaration; for, in *Nokes v. Awdor*, Cro. Eliz. 373. 436., it was resolved, by all the judges, that, although they would not intend a lease to be good by estoppel only, yet where it appeared on the face of the declaration to be so, the assignee of such a lease could not maintain an action for the breach of any of the covenants contained in the lease. So where covenant was brought against a lessee for years^l, on an indenture of lease, and it appeared on the declaration, that the lease was executed by a tenant for life, that the plaintiff, the reversioner, who was then under age, was named in the lease, but that the lease had not been executed by him until after the death of the tenant for life, judgment was given for the defendant, on the ground that the lease was void by the death of tenant for life; Buller J. observing, that the court could not proceed on the doctrine of estoppel in this case, because it was admitted by the plaintiff, on the pleadings, that he did not execute until after death of the tenant for life. So where the plaintiff declared, that by deed made between her as *attorney for J. S.^m* on the one part, and the defendant on the

^l Parker and others assignees of Steel (a bankrupt) v. Manning, 7 T. R. 537. ^l Ludford v. Barber, 1 T. R. 86. ^m Frontin v. Small, Ld. Rsym. 1418. Str. 706. S. C.

^k Taylor v. Needham, 2 Taunt. 978.

other part, she demised a house to the defendant, and that he covenanted to pay the rent to J. S., and then assigned a breach in the non-payment of the rent, to the damage of the plaintiff (the attorney): On demurrer it was objected, that the lease was void, because the plaintiff acting only as attorney to J. S., it should have been made as a lease from him, and in his name^a, and that, the lease being void, the covenant to pay the rent was void also. *E contra* it was insisted, that the instrument being under seal, the defendant was estopped from saying the plaintiff did not demise. But the court held, that, it appearing on the declaration that the lease was void, because it was not made in the name of J. S. whose house it appeared to be, and that the plaintiff only made it as his attorney, there could not be any estoppel, and then the covenant to pay the rent was void, and consequently the plaintiff could not maintain the action.

Where a lease, by indenture, takes effect in point of interest, which interest may be co-extensive with the lease in point of duration, but in fact determines before it, the lease may then be avoided, and the parties are not estopped from shewing the facts which determined the lease; as where A., lessee for life of B., makes a lease for years^b, by deed indented, and afterwards purchases the reversion in fee; B. dies; A. shall avoid his own lease; for he may confess and avoid the lease, which took effect in point of interest, and determined by the death of B. (64). So where covenant was brought by plaintiff^c, as heir in reversion in fee to his brother, on an indenture of lease for years, made to defendant by plaintiff's father, and breach assigned for want of repairs; defendant pleaded, that the father was tenant for life only, and that the lease had determined by his death, and traversed, that after the making the lease, the reversion in fee had belonged to the father; on demurrer, judgment was given for the defendant; for, as was said in argument, and adopted by the court, though during the father's life the lessee would have been estopped from saying that the father had not the reversion in him, yet on his death the lease was at an end; and the lessee was not estopped from

^a See *Wilks v. Back*, 2 East, 142.

^p *Brudnell v. Roberts*, 2 Wils. 143.

^b 1 Inst. 27 b. See *Treport's case*, 6

Rep. 15 a. to the same effect.

(64) This case having been cited in *Gilman v. Hoare*, Salk. 275. Holt C. J. said, that the reason of it was, because tenant for life has a freehold, which is a greater estate, and the lease will not require any estoppel, if the life endure.

pleading the truth by confessing and avoiding the lease; and it was holden, that the traverse was well taken.

6. *Non est factum.*

To an action of covenant the defendant may plead that the deed (on which the plaintiff has declared) is not his deed. This plea puts in issue the due execution of the deed, which it is incumbent on the plaintiff to prove. If there be a subscribing witness to the deed, the execution must be proved by such witness (65).

This plea is considered as the general issue in this action. To support the plea of *non est factum*, the defendant may give in evidence any thing which proves the deed to be void at the time of pleading; as drawing a pen through a line or material word; rasure; addition to, or other alteration of the deed in a material part^q; or a material variance between the deed declared on and the deed produced in evidence^r.

So coverture of the defendant, at the time of execution, may be given in evidence under this issue.

In covenant, the declaration stated a joint demise by husband and wife^s. Plea, *non est factum*. It appeared in evidence that the husband was tenant for life, with remainder to the wife for life, and that they had jointly demised to the defendant. After verdict, a motion was made for a new trial, on the ground, that the demise stated was an impossible demise; for the husband alone had the power of demising, and the wife could only confirm; the court discharged the rule: and Blackstone J. said, "The issue is, that there is no such deed as stated in the declaration; if in fact such a deed appears, the defendant, who is in possession under it, shall not question the title of the plaintiffs to make such demise, and thereby evade the performance of what he himself has stipulated. And Nares J. said, on the issue of *non est factum* in covenant, the deed only must be proved.

^q Whelpdale's Case, 5 Rep. 119. b. ^s Friend v. Eastbrook, 9 Bl. [Rep. 1152.
^r Pigot's Case, 11 Rep. 27. a.
^r Pitt v. Green, 9 East, 188. Bowditch v. Mawley, 1 Camp. N. P. C. 195.

(65) For the exceptions to this rule, see post tit. Debt on bond; *non est factum*, p.

If the plaintiff declares for a breach of covenant, and states the covenant, by itself, in its own absolute terms, without the qualifying context, which belongs to it, this being an untrue statement, in point of substance and effect, of the deed, will entitle the defendant to a non-suit on the ground of a variance, on the plea of *non est factum*†.

If *nil debet* be pleaded to covenant on an indenture of lease for non-payment of rent, the plaintiff may demur‡.

7. *Non infregit conventionem.*

I am not aware of any case at common law (66) in which *non infregit conventionem* has been holden to be a good plea on demurrer: if it can be pleaded in any case, it must be in the single case where the declaration states a single breach of covenant in the affirmative, and concludes with an affirmative allegation, "And so the defendant has broken his covenant."

In the following cases, the plea of *non infregit conventionem* was holden to be improperly pleaded.

In covenant on a lease‡, for not repairing the premises demised, the plaintiff assigned several breaches. Plea, *non infregit conventionem*. On demurrer the court gave judgment for the plaintiff, on these grounds; 1st, That the plea was too general; for several breaches were assigned: 2d, That the breach being in *non reparando*, *non infregit conventionem* could not be a good plea; because two negatives could not make a good issue.

So where in covenant‡, the breach assigned was for non-payment of an annuity; the defendant pleaded, that he had not broken his covenant: special demurrer, that the breach and plea both being in the negative, there was not any issue. Judgment for the plaintiff.

So where plaintiff declared on a covenant for quiet enjoy-

† Adm. per Cur. in *Howell v. Richards*, 11 East, 633. x *Pitt v. Russel*, 3 Lev. 19. *Taylor v. Needham*, 2 Taunt. 278.

‡ *Tyndal v. Hutchinson*, 3 Lev. 170. y. *Boone v. Eyre*, 2 Bl. Rep. 1912.

(66) By stat. 11 G. 1. c. 30. s. 43, in actions of covenant upon policies of insurance under the common seal of either of the two insurance companies (Royal Exchange and London Assurance), the defendants may plead that "*they have not broke the covenants, in such policy contained, or any of them.*"

ment^z, and assigned several breaches, in which were stated evictions by different persons, and concluded with these words, "and so the defendants have not kept their covenants." The defendants pleaded *non infregit conventionem*. On special demurrer, assigning for causes, that the plea attempted to put in issue several matters, and to make an issue out of two negatives, the court gave judgment for the plaintiff, observing that the plea was only argumentative, and therefore an improper plea.

8. Performance.

If all the covenants be in the affirmative^a, the defendant may plead generally, performance of all; but if any be in the negative, to so many he must plead specially, (for a negative cannot be performed,) and to the rest generally (67). So if any of the covenants be in the disjunctive^b, the defendant must shew, which of them he hath performed. So if any are to be done of record^c, he must shew that specially, and cannot involve it in general pleading.

So if a covenant be partly affirmative and partly negative^d; as where the words of the covenant were, that defendant *decederet, procederet, & non deviet*; defendant having pleaded performance generally, the plea was holden bad.

Performance must be pleaded in the terms of the covenant; otherwise it will be bad on general demurrer^e.

9. Release.

If a man, by deed, covenant to build an house^f, or make an estate, and before the covenant broken, the covenantee releaseth to him all actions, suits, and quarrels, this doth not discharge the covenant itself; because at the time of the release, there was not any duty or cause of action in being.

^z *Hodgson v. The East India Company*, 9 T. R. 278.

^a 1 Inst. 303. b.

^b 1 Inst. 303. b.

^c *Ib.*

^d *Laughwell v. Palmer*, 1 Sidf. 87.

^e *Scudamore v. Stratton*, 1 Bos. & Pul. 455.

^f 1 Inst. 292. b.

(67) The same rule holds in debt on bond conditioned for the performance of covenants. *Cropwel v. Peachy*, Cro. Eliz. 691. In this case, advantage was taken of the wrong pleading, by demurrer.

In covenant by assignee of feoffee^d, against feoffor, for a breach of covenant to make further assurance, in not levying a fine at the request of the assignee; defendant pleaded a release from the feoffee, which release bore date after the commencement of the action by the assignee; on demurrer, it was holden, that the breach being in the time of the assignee, and the action brought by him, and so attached in his person, the covenantee could not release this action, wherein the assignee was interested: Judgment for plaintiff. N. Rolle, in his abridgment, states the opinion of the court to have been as reported by Croke, but adds, that judgment was given *against* plaintiff *pur auter cause*. See 2 Roll. Abr. 411. Release, D. pl. 11.

To covenant for non-payment of rent^d, the defendant cannot plead a release, by the plaintiff, of all demands, at a day before the rent in question became due.

Where the party takes a bond, and also a deed of covenant, to secure an annuity, although the bond is forfeited before a discharge under the insolvent debtors' act, (16 G. 3. c. 3.) yet the covenantor may be sued on the covenant, for payments becoming due, after the discharge^l. So the insolvent debtors' act, 34 G. 3. c. 69. does not discharge an insolvent, entitled to the benefit of that act^k, from the payment of the arrears of an annuity becoming due, after his discharge, on a covenant made before that act.

10. Set-off.

In covenant upon an indenture for non-payment of rent^d, the defendant pleaded *non est factum*, and gave a notice of set-off; Mr. J. Denton, at the assizes, was of opinion, that he could not do so upon this issue; but upon a motion for a new trial, the court held the evidence admissible; for the general issue mentioned in the act^m must be understood to mean any general issue.

Unliquidated damagesⁿ, arising from the breach of other covenants to be performed by the plaintiff, cannot be pleaded by way of set-off.

To covenant on an indenture of lease of a house for non-payment of rent, the defendant pleaded, that by the inden-

g Middlemore v. Goodall, Cro. Car. 503.

h Hens v. Hanson, 1 Lev. 99.

i Cotterel v. Hooke, Doug. 97.

k Marks v. Upton, 7 T. R. 305.

l Gower and another v. Hunt, Ball. N. P. 181. Barnes, 991. S. C.

m 2 G. 3. c. 92.

n Howlet v. Strickland, Corp. 56.

ture he covenanted to repair, and to surrender to the plaintiff, at the end of the term, the premises in good repair, "casualties by fire and tempest excepted;" that a stack of chimnies belonging to the house had been thrown down by a tempest, which had damaged the house so much that it would soon have become uninhabitable, if the defendant had not immediately repaired it; that he had been obliged to lay out, in the repairs, a sum of money (exceeding the amount of the rent in arrear) which the plaintiff became liable to repay to him, and that he was ready to set-off the same according to the statute, &c. On special demurrer, it was holden, that the plea could not be supported; for admitting that the defendant could maintain any action against the plaintiff (his landlord), yet the sum to be recovered could only be ascertained by a jury; and, consequently, the damages being uncertain, they could not be set-off to the present action.

VIII. *Payment of Money into Court.*

WHERE covenant is brought for payment of a sum certain, as for rent, &c. the money may be brought into court.

In covenant upon a lease, the breach assigned was for non-payment of rent, and not repairing the premises; on motion that upon payment of what should appear due for rent, proceedings as to that should be staid, the court said, "this has often been done, so let it be referred to the master."

In covenant, the breach was assigned in a sum certain (11*l.*) for not dressing corn. On motion to bring the 11*l.* into court, the counsel for the plaintiff consented, admitting that the breach was assigned with equal certainty, as for non-payment of rent.

In *Fullwell v. Hall*, 2 Bl. R. 837. application was made to the court in an action of covenant to pay money into court, *generally*, which the court refused; but there being a breach assigned for non-payment of rent, and for not paying 5*l.* per acre for ploughing up meadow land, they per-

o *Weigall v. Waters*, 6 T. R. 490.
p *Salk.* 596.

q *Anon.* B. R. Trin. 17 & 18 G. 2.
1 *Wils.* 75.

r *Walnouth v. Houghton*, *Barnes*, 284.

mitted money to be paid in on those breaches, on the authority of the preceding case.

Covenant on a charter party^a: motion to pay 504*l.* into court; which was opposed, on the ground, that the demand in the breach was 570*l.*; the court held, that the whole must be brought in.

In covenant for non-payment of rent^b, and breach half a year's rent in arrear: motion, that, only a quarter being due, the defendant might be permitted to bring that in; but the court said, that it might be referred to the master to see what was due, and, on bringing that in, to stay proceedings; but there never was a rule to bring in part of the money on a breach. The counsel for defendant not caring to take that rule, the court denied the motion.

Covenant for non-payment of rent^c: motion, that it might be referred to the master to see what was due for rent; and that on payment into court of so much as might be reported due, the plaintiff might proceed on peril of costs, if he should not recover more. Rule absolute, though opposed. See also *Byron v. Johnson*, 8 T. R. 410.

IX. Evidence.

THE plaintiff can recover only *secundum allegata et probata*:

Hence, where plaintiff covenanted for a sum of money to build a house within a certain time^d, and averred in an action for non-payment of the money, that the house was built within the time; it was holden, that evidence that the time had been enlarged by parol agreement, and the house finished within the enlarged time, did not support the declaration.

So where the breach assigned was^e, that the defendant had not used the premises in an husband-like manner, but *on the contrary* had committed waste. Plea, that defendant had not committed waste. At the trial, the plaintiff offered evidence to shew, that the defendant had not used the premises in an husband-like manner, which did not how-

^a *Spencer v. Fawthorp*, B. R. T. 15 & 16 G. 2. MSS.

^t *Bonwick v. Butler*, B. R. H. 17 G. 2. MSS.

^u *Hayes v. Taylor*, B. R. M. 9 G. 2. MSS.

^x *Little v. Holland*, 3 T. R. 590.

^y *Harris v. Mantle*, 3 T. R. 307.

ever amount to waste; the judge rejected the evidence, being of opinion, that on this issue it was not competent to the plaintiff to prove any thing which fell short of waste. This opinion was afterwards confirmed by the court.

In covenant for rent upon a lease by plaintiff to defendant², the point in issue was, whether J. S. (whose title was admitted by plaintiff and defendant) demised first to the plaintiff, or to another person; it was holden, that J. S. was a competent witness to prove the point in issue.

In covenant, under the general issue, *non est factum*³, the defendant will not be allowed to give in evidence what amounts to a licence.

X. Judgment.

THE judgment in this action is for the recovery of such damages as the party can prove that he has actually sustained^b.

If the defendant has judgment against him upon nil dicit, confession, or demurrer, a writ of inquiry shall be awarded to inquire of the damages^c.

Where the breach was assigned on two covenants^d, and plaintiff had good cause of action only on one, and issue was joined on both, and verdict for plaintiff on both, and damages entirely assessed, it was holden that plaintiff could not have judgment.

Covenant was brought against two defendants for not building a house^e; one suffered judgment to go by default, the other pleaded performance, which was found for him; it was holden, that the plaintiff could not have a writ of inquiry of damages, or judgment against that defendant who had suffered judgment by default; because the covenant being joint and the performance of it having been established by the verdict, it appeared, that plaintiff had not any cause of action.

If on the whole record it appears, that the defendant has

² Bell v. Harwood, 3 T. R. 308.

³ Ratcliffe v. Pemberton, 1 Esp. N. P. C. 35.

^b See the form, Townsend, 2 Bk. Judg. 55.

^c See the form, 1 Saund. 47.

^d Anon. Cro. Eliz. 685.

^e Porter v. Harris, 1 Lev. 63.

committed a breach of the covenant declared on, although the plaintiff states his real *gravamen* informally, judgment cannot be arrested; for, however defective the pleadings are, the court are bound *ex officio* to give such judgment, as the law requires them to do. ¶

As where A. declared that B., before her intermarriage with C.^f, by deed covenanted with A. to leave certain matters to arbitration, and to abide by the award, provided it were made during their lives; *and protesting that B. had not before her intermarriage performed her part of the covenant, averred that after making of the indenture and the intermarriage of the defendants, the arbitrator awarded B. to pay a certain sum; and the breach assigned was the non-payment of the sum so awarded.* After verdict for plaintiff, on *non est factum* pleaded, it was moved in arrest of judgment, that the marriage of B., after entering into the covenant and before award made, was a revocation of the arbitrator's authority, and consequently there could not be any breach of an award which he had not any authority to make. Lord Ellenborough C. J. said, that if the case had come on upon a special demurrer, as for a defective allegation of the breach of covenant by marrying, there would have been good ground for the defendants' objection to the manner of declaring; but although the plaintiff had stated his *gravamen* informally, yet there was a sufficient allegation of the fact of the marriage being before the award, which constituted a breach of covenant to warrant the court in giving judgment for the plaintiff on that ground. Rule discharged.

^f Charnley v. Winstanley and wife, 5 East, 266.

CHAP. XIV.

DEBT.

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- II. *Debt on Simple Contract.*
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- IV. *Debt on Bail-bond—Stat. 23 H. 6. c. 10.—Assignment of Bail-bond under Stat. 4 Ann. c. 16. Declaration by Assignee—Of the Pleadings ; comperuit ad Diem—Nul tiel Record.*
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the Liability of Devisee under the same Statute.

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VII. *Debt on Judgment.*

VIII. *Debt for Rent Arrear—Stat. 4 G. 2. c. 28. against Tenants holding over after Notice from Landlord—Stat. 11 G. 2. c. 19. against Tenants holding over after Notice given by themselves—Declaration—Debt for Use and Occupation—Pleadings—Evidence.*

IX. *Debt against Sheriff, &c. for Escape of Prisoner in Execution—Stat. 13 Ed. 1. c. 11. 1 R. 2. c. 12.—What shall be deemed an Escape—By whom the Action for an Escape may be brought—Against whom—Declaration—Pleadings—Evidence.*

X. *Of the Statutes, and general Rules, relative to Actions founded on penal Statutes.*

XI. *Debt on Stat. 2 G. 2. c. 24.—Bribery at Elections—Provisions of the Statute—Declaration. Evidence—Stat. 7 & 8 W. 3. c. 4. Treating Act.*

I. *Of the Action of Debt, and in what Cases it may be maintained.*

AN action of debt lies for the recovery of a sum certain upon simple contract, bond, other specialty, or record; for rent arrear^a; against a gaoler for the escape of a prisoner in execution; or upon statute by the party grieved or common informer.

If a statute prohibit the doing an act under a certain penalty^b, but does not prescribe any mode for recovering the

^a Carth. 161, 2.

^b 1 Rol. Abr. 599. pl. 18, 19.

penalty, the party entitled may recover the penalty by action of debt.

Debt also lies for the recovery of a sum of money due under an award^c.

So debt lies for an amerciamment in a court leet^d. In this case it ought to be alleged in the declaration, that the defendant was an inhabitant, as well at the time of the amerciamment, as of the offence; but the omission of this averment will be cured by verdict.

The plaintiff declared in debt on a deed^e, whereby the defendant *covenanted* to pay the plaintiff so much per hundred for every hundred stacks of wood in such a place, and bound himself in a penalty for the performance; it was averred, that there were so many stacks, which amounted to a sum exceeding the penalty, for which sum the plaintiff brought his action. On demurrer it was objected, that, as there was a penalty for a certain sum, the plaintiff could not have an action for more than that sum: but the objection was overruled, Holt C. J. observing, that the plaintiff had an election either to sue for the penalty, or for the rate agreed on, although it exceeded the penalty; for the penalty was inserted only to enforce payment. It was then objected, that the proper form of action was covenant, and not debt: but per Cur. the plaintiff may have covenant or debt at his election; for the rate being certain, when the defendant has the wood, the agreement becomes certain, for which debt lies.

In the action of debt the plaintiff is to recover the sum in numero, and not a compensation in damages, as in those actions which sound in damages only; such as *assumpsit*^f, &c. The damages given in the action of debt, for the detention of the debt are merely nominal.

II. *Debt on simple Contract.*

DEBT lies upon a simple contract, either express or implied^g, to pay a sum certain.

Debt lies by the payee against the maker of a promissory note, expressing a consideration on the face of it; as where

^c Adm. 2 Saund. 66.

^d Wicker v. Norris, Bull. N. P. 167.
Ca. Temp. Hardw. 116. S. C.

^e Ingledew v. Crips, Ld. Raym. 814.
Salk. 658. S. C.

^f Bull. N. P. 167.

^g Speake v. Richards, Hob. 206.

it is expressed to be for value received^h. But debt will not lie upon a bill of exchange against the acceptor; for, though the acceptance binds by the custom of merchants, yet it does not create a duty any more than a promise made by a stranger to pay, &c. if the creditor will forbear his debt. The drawer of the bill is the debtor, and continues to be the debtor, notwithstanding the acceptance; for that is a collateral engagement only (1): nor will debt lie for a wagerⁱ.

Debt lies upon a foreign judgment^k: as upon a judgment of the supreme court in Jamaica; and, in an action of this kind it is not necessary for the plaintiff to state the grounds of the judgment, the judgment being of itself *prima facie* evidence of a simple contract debt: it is competent, however, to the defendant, to impeach the judgment by shewing it to have been irregularly or unduly obtained. To support an action on a foreign judgment^l, it is not sufficient to prove the judge's hand-writing subscribed to it; the seal affixed thereto must also be authenticated.

A declaration in debt for goods sold and delivered^m, stating that the defendant at W. in the county of M., was indebted to the plaintiff in a certain sum for goods sold and delivered, is sufficient; for the words "sold and delivered" imply a contract; as there cannot be a sale, unless two parties agree; and as the venue goes to the whole declaration, the venue laid must be taken to be the place where the contract was made for the sale of the goods.

Formerly it was considered as necessary, that the amount of the sums claimed to be due in the several counts of the declaration should correspond exactly with the sum demanded in the recital of the writ, and neither exceedⁿ nor fall short of it^o. But this is not now considered as requisite; and in a late case^p, where debt was brought on simple contract, it was holden, on special demurrer to the declaration, that the declaration was good, although the sums

^h Bishop v. Young, 2 Bos. & Pul. 78.

ⁱ Ld. Raym. 69.

^k Walker v. Witter, Doug. 1.

^l Henry v. Adey, 3 East, 221.

^m Emery v. Fell, 2 T. R. 28.

ⁿ Hulme v. Saunders, 2 Lev. 4.

^o Smith v. Vowe, Moore, 298.

^p M'Quillin v. Cox, 1 H. Bl. 249.

(1) "Indebitatus assumpsit will not lie in any case except where debt lies: therefore it lies not against the acceptor of a bill of exchange; for the acceptance is merely a collateral engagement: but, indebitatus assumpsit lies against the drawer, who is really the debtor by the receipt of the money; and debt will lie against the drawer." Hard's case, Salk. 23.

claimed to be due in the several counts did not amount to the sum demanded in the recital of the writ; and although the breach was assigned for non-payment of the sum demanded; the court observing, that in debt on simple contract the plaintiff might prove and recover a less sum than he demanded in the writ. In like manner where an action of debt was brought in the Court of King's Bench¹, on a bond, and several simple contracts, and the amount of the sums claimed to be due in the several counts exceeded the sum demanded in the beginning of the declaration, it was holden, on special demurrer, that the declaration was good; for the words "of a plea that he render £" in the King's Bench, at least are superfluous words, and being rejected there will not be any repugnance on the face of the declaration. See also the opinion expressed by Lord Mansfield C. J. in *Walker v. Witter*, 1 Doug. 3d edit. 6. "it is not necessary that the plaintiff should recover in debt the exact sum demanded." See also *Aylett v. Lowe*, 2 Bl. R. 1221, where in debt on a mutuatus for 200*l.* and verdict for 100*l.*, the court refused a new trial; although it was urged, that debt being an entire thing, it could not be recovered in part.

III. Debt on Bond—Of the Pleadings :

1. *General Issue, non est factum, and Evidence thereon.*
2. *Accord and Satisfaction.*
3. *Duress.*
4. *Illegal Consideration,*
 1. *By the Common Law, immoral—in Restraint of Trade, &c.*
 2. *By Statute, Gaming—Sale of Office—Simony—Usury.*
5. *Infancy.*
6. *Payment—Solvit ad Diem—Solvit post Diem, and Evidence thereon.*
7. *Release.*
8. *Set-Off.*

Debt on Bond.—If a bond be dated on a day certain, with

¹ Lord v. Houstoun, 11 East, 62.

a penalty conditioned for the payment of a lesser sum^r, and there be not any day fixed for the payment of the lesser sum, such sum is payable on the day of the date; and if an action be brought upon the bond, the court will refer it to the master to compute principal, interest, and costs, and on payment of the same, will stay the proceedings under the stat. 4 Ann. c. 16. s. 13. Interest will become due on such bond^a, although not expressly reserved, and is to be computed from the day on which the money secured by the bond becomes payable, viz. the day of the date.

If a person be bound to pay a certain *sum* of money at several days^t, the obligee cannot maintain an action of debt until the last day be past (2). But upon a bond with a penalty conditioned to pay several sums of money at different days^u, debt will lie immediately on default of payment at either of the days (3): for the condition is thereby broken, and consequently the bond becomes absolute. And this rule holds, although the condition of the bond does not expressly provide "that in default of payment at any of the said times, the bond shall be in force."

If A. enter into a bond to pay money on two several contingencies, the obligee may maintain debt on the happening of either contingency^r.

If an instalment of an annuity^r, secured by bond, be not

^r Farquhar v. Morris, 7 T. R. 124.

See also Nose v. Bacon, Cro. Eliz. 798. 1 Inst. 208. a.

^s 7 T. R. 124.

^t 1 Inst. 47. b. 292. b. F. N. B. 304.

^u Coates v. Hewitt, 1 Wils. 80. Bull.

N. P. 168. S. C. Hallet v. Hodges, cited by the Reporter, 1 Wils. 80. & Say. R. 29. S. P.

^x 1 Lev. 54.

^y Judd v. Evans, 6 T. R. 399.

(2) Debt will not lie on a promissory note payable by instalments, until the last day of payment be past. Rudder v. Price, 1 H. Bl. 547. See the elaborate judgment of the court, and the distinction there taken between debt and assumpsit in this respect.

(3) So on a covenant or promise to pay a sum of money by instalments, an action of covenant or assumpsit will lie immediately on the non-payment of the first instalment. 1 Inst. 292. b. Milles v. Milles, Cro. Car. 241. So if money is awarded to be paid at different days, assumpsit will lie on the award for each sum as it becomes due, and the plaintiff shall recover damages accordingly; and when another sum of the money awarded shall become due, the plaintiff may commence a new action for that also, and so on *toties quoties*. Cooke v. Whorwood, 2 Saund. 337. The same rule holds in respect of duties, which touch the realty. 1 Inst. 292. b.

paid on the day, the bond is forfeited, and the penalty is the debt in law, for which judgment may be entered, which shall stand as a security for the growing arrears of the annuity.

Where a place of date is mentioned in the bond^z, it is incumbent on the plaintiff to set it forth in the declaration, so that the bond produced in evidence may agree with the bond declared on. Hence, if a bond be dated abroad, the declaration must state the place of such date, and then the venue must be added for a place of trial.

In an action of debt^a upon bond, the court will not permit money to be paid into court, but will refer it to the master to compute what is due for principal and interest.

Of the Pleadings:

1. *General Issue, non est factum, and Evidence thereon.*

THE general issue to an action of debt on bond, is *non est factum*; because the action is grounded upon the specialty. If the defendant plead *nil debet* instead of *non est factum*, the plaintiff may take advantage of it upon general demurrer^b. Upon the issue of *non est factum*, the plaintiff must prove the execution of the bond *by the defendant*. Proof that one, who called himself D., executed, is not sufficient, if the witness did not know it to be the defendant^c. To prove the execution of a bond, the sealing *and* delivery must be proved. Proof of the sealing only is not sufficient. Hence in a case^d where the jury found, that the defendant sealed the bond and cast it upon the table, and the plaintiff took it without any other delivery, or any other thing amounting to a delivery, the court were of opinion, that this was insufficient; observing, that it was not like the case which had then lately been adjudged^e, where the obligor had sealed the bond, and cast it upon the table, saying "this will serve," which was holden a good delivery; because from the expressions used by the obligor, it appeared to be his intention that it should be his deed. If the obligor says to the obligee, "it is suffi-

^z Robert v. Harnage, Ld. Raym. 1043. Salk. 659. N. C. 1 Inst. 261. b. See also Dutch W. I. Company v. Van Moses, 1 Str. 612.

^a Anon. E. 25 G. 3. B. R. MSS.

^b Anon. 2 Wils. 10.

^c Memot v. Bates, H. 4 G. 2. Bull. N. P 171.

^d Chamberlain v. Stainton, Cro Eliz. 129. 1 Leon. 140. Dyer in marg. 192. S. C.

^e 1 Inst. 36. a.

cient for you," or "take it as my deed," or the like words, it is a sufficient delivery^f. If a person deliver a writing sealed *to the party to whom it is made*, as an escrow, that is, to be his deed upon certain conditions, that is an absolute delivery of the deed, being made to the party himself^g. But a deed may be delivered to a stranger as an escrow^h.

If there is a subscribing witness to the bond who is living, and capable of being examined, such witness alone is competent to prove the execution; because he may know and be able to explain the circumstances of the transaction, of which a stranger may be ignorant(4); and for this reason it has been holdenⁱ, that a confession or acknowledgment of the party executing the bond will not dispense with this testimony. Even the admission of the obligor of the execution of a bond in an answer to a bill in chancery^k, filed for the express purpose of obtaining such admission, has been adjudged to be insufficient without evidence to account for the non-production of the subscribing witness(5). It is not necessary that the subscribing witness should actually see the party execute the bond^l, for if the witness be in an adjoining room, and the obligor, after the execution, brings the bond to the witness, and says that he has executed it, and desires the witness to subscribe his name as a witness, this is sufficient. If there be two or more subscribing witnesses, it will only be necessary to call one of them. If the subscribing witness be interested at the time of the execution^m, and also at the time of the trial, he cannot be examined as a witness to prove the execution, nor will proof of his hand-writing be sufficient. In this case proof of the

^f 1 Inst. 36. a.

^g Ib.

^h Ib.

ⁱ Abbott v. Plumbe, Doug. 215.

^k Call v. Dunning, 4 East, 53.

^l Park v. Mearns, 2 Bos. & Pul. 217.

^m Swire v. Bell, 5 T. R. 371.

(4) This rule is religiously adhered to, nor can it be dispensed with, even where the instrument is not the foundation of the action, but only given in evidence collaterally. See the opinion of Ld. Alvanley C. J. in *Manners q. t. v. Postan*, 4 Esp. N. P. C. 240.

(5) But in a case where the defendant's attorney had admitted the signature of the defendant, and of the subscribing witness to the bond, Lord Ellenborough ruled, that this must be taken as a presumptive admission of all the subscribing witness professed to attest, and would have been called to prove, and consequently, that it was not necessary to bring proof of delivery. *Milward v. Temple*, 1 Camp. N. P. C. 375.

hand-writing of the contracting partyⁿ must be adduced (6). If it can be proved, that the subscribing witness is dead or has become infamous^o, or is domiciled^p, or absent in a foreign country, and out of the jurisdiction of the court^q, at the time of trial; or that intelligence cannot be obtained of him after reasonable inquiry has been made^r; proof of his hand-writing will in such cases be sufficient (7).

n Godfrey v. Norris, Str. 34.

o Jones v. Mason, 2 Str. 833.

p Coghlan v. Williamson, Doug. 93.

q Prince v. Blackburne, 2 East's R. 250.

r Cunliffe v. Sefton, 2 East, 183. Crosby v. Percy, 1 Taunt. 364. Wardell

v. Ferner, 2 Camp. N. P. C. 282. S.

P. Parker v. Hoskins, 2 Taunt. 223.

(6) In Godfrey v. Norris, Str. 34. where the plaintiff was administrator *de bonis non* of the obligee, and the only surviving witness to the bond, Parker C. J. permitted evidence of the hand-writing of the obligor to be given.

(7) So where a bond is attested by two witnesses and one is dead, and the other beyond the reach of the process of the court, proof of the hand-writing of the witness that is dead is sufficient^{*}.

It appears from Wallis v. Delancey, 7 T. R. 266. n. that Ld. Kenyon thought it necessary in cases of this kind, that the hand-writing of the obligor should be proved as well as the hand-writing of the subscribing witness.—But although this point was doubtful formerly, it appears to have been solemnly decided in the following case.

Debt on bond†: there was one witness to the bond who was dead, his hand-writing was proved, but not the hand-writing of the obligor.

On Serjt. Kerby's objecting, that hand-writing of obligor was not proved, Ld. Loughborough directed a non-suit.

Walker Serjt. moved to set aside the non-suit; because signature is not necessary, and if subscribing witness had been dead, he need not have proved hand-writing of obligor. Cited 2 Rep. 5. Salk. 462. and Ford's MSS. note of case before Eyre C. J. where a deed was attested by two witnesses who were dead—the hand-writing of one of the witnesses only was proved, and not the hand-writing of the other witness or *of the party executing deed*. Kerby Serjt. The obligor need not have signed, but having signed the bond, his hand-writing ought to have been proved; the antient reason (3 Lev. 1.) for sealing is now at an end, the most satisfactory proof is the hand-writing instead of sealing—the witness's attestation is not the only evidence, and after his death there being no opportunity of cross-examining him as to the execution, best evidence is that of obligor's hand-writing—relied on the practice. Ld. Loughborough

* Adam v. Kerr, 1 Bos. & Pul. 360.

† Gough v. Cecil, C. B. Trin. 24 G. 3. Serjt. Hill's MS. 21. p. 73.

By stat. 26 G. 3. c. 57. s. 38. deeds executed in the East Indies, and attested by witnesses *there*, are made evidence on proof of the hand-writing of the parties, and of the witnesses, and also that the witnesses are resident in the East Indies.

If the bond be 30 years old or upwards*, it may be given in evidence without any proof of the execution(8); some account, however, ought to be given of it, where found, &c.† in order to raise the presumption, that it was regularly executed(9). But if there be any blemish in the bond by rasure

* Bull. N. P. 255.

† Governor and Company of Chelsea

Water Works v. Cowper, 1 Esp. N. P. C. 275.

thought the proof of obligor's hand-writing much the most satisfactory to court and jury. Gould J. thought so too, and according to his memory it was the practice on Western circuit. Nares J. differed on principle and practice of Oxford circuit. Heath J. concurred with Nares J. on principle and practice—said that it was good *prima facie* evidence. Ld. Loughborough C. J. thought the practice ought to decide, and would take time to inquire of it—afterwards the court granted a new trial. N. In conversation a few days after, Gould J. expressed his dissatisfaction to Serjt. Kerby.

In addition to the preceding decision it may be observed, that Mr. J. Buller in *Adam v. Kerr*, 1 Bos. & Pull. 361. held, “that the hand-writing of the obligor need not be proved; that of the subscribing witness, when proved, is evidence of every thing on the face of the paper; which imports to be sealed by the party.” The same doctrine may be inferred from the cases of *Cunliffe v. Setton*, 2 East, 183. and *Prince v. Blackburn*, 2 East, 250.

If the subscribing witness swears that he did not see the deed executed, then the execution may be proved by evidence of the hand-writing of the party*. The same rule holds with respect to a promissory note†.

(8) This rule extends to other paper writings, as well as deeds, e. g. old receipts. *Fry v. Wood*, M. 11 G. 2. B. R. MSS.

(9) It is worthy of remark, that in *Rees v. Mansell*, Hereford Sum. Ass. 1765, MSS. Perrot, Baron, held, that if a deed is read in evidence on account of its antiquity, yet if on the other side it is shewn, that one of the witnesses is alive, he must be produced; or the deed must be rejected. And he said a deed being produced in B. R. and going to be read, it appeared that Sir J. Jekyll was a subscribing witness; upon which the court said, they knew he was alive, and if he did not come to prove it, plaintiff must be non-suit. It was mentioned to have been said by Yates J. on a former cir-

* *Fitzgerald v. Elsee*, 2 Camp. N. P. C. 635. Lawrence J.

† *Lemon v. Dean*, 2 Camp. N. P. C. 636. n. Le Blanc J.

or interlineation, the execution ought to be proved, although the bond be above 30 years old, by the subscribing witness, if living, and if he is dead, by proving his hand-writing, in order to encounter the presumption arising from the rasure, &c.

The defendant, on the general issue of *non est factum*^a, may give in evidence any thing which proves the deed to be void at the time of pleading; as rasure, interlineation, addition to, or other alteration of the deed in a material point by the obligee, or even by a stranger without the privity of the obligee. In like manner the defendant, on *non est factum*, may give in evidence coverture^x or lunacy^y, at the time of execution; or that the bond was given to a feme covert, and her husband disagreed to it; or that the bond was delivered as an escrow^z; or that he was made to execute it when he was so drunk, that he did not know what he did^a. But if the deed is voidable only, as by reason of infancy or duress, in these, and the like cases, the obligee cannot plead *non est factum*; for it is his deed at the time of action brought, and must be avoided by special pleading^b. So if the bond is voidable by statute, that must be pleaded specially. In the case of a joint bond, if one obligor only be sued, he must plead the matter in abatement^c; for he cannot take advantage of it in evidence on the general issue *non est factum*^d, although it appear upon the declaration that there are other obligors^e; nor can he demur upon oyer^f. So where the bond is executed by three obligors, and two only are sued^g. But where it appears on the record, the objection may be taken in arrest of judgment^h.

^u Pigot's case, 11 Rep. 27 a. 5 Rep. 119. b.

^x 12 Mod. 609. per Holt C. J. Lambert v. Atkins, 2 Camp. N. P. C. 272. S. P.

^y Yates v. Boen, Str. 1104. per Lee C. J. on the authority of Smith v. Carr, by Pengelly C. B.

^z Stoytes v. Pearson, 4 Esp. N. P. C. 255. Ellenborough C. J.

^a Cole v. Robbins, per Holt C. J. Salk. MSS. Bull. N. P. 172.

^b 5 Rep. 119. a.

^c Watts v. Goodman, Lord Raym. 1460.

^d Whelpdale's case, 5 Rep. 119. a. Stead v. Moon, Cro. Jac. 152.

^e South v. Tanner, 2 Taunt. 254.

^f Gilbert v. Bath, Str. 503.

^g South v. Tanner, 2 Taunt. 254. Gaultou v. Challiner and Wilkinson, 1 Wms. Saund. 291 c. n.

^h Horner v. Moor, B. R. M. 24 Geo. 2. cited by Aston J. 5 Burr. 2614.

cuit, that, for the sake of practice, the witness should not be admitted to prove an old deed, even if he attended for that purpose; but Perrot B. retained his opinion, and said, that an old deed is admitted only on a presumption, that the witnesses are dead; but when the contrary is made to appear, they must be called.

2. *Accord and Satisfaction.*

It appears from some of the books¹, that to debt on bond an accord executed *before the day of payment* may be pleaded. I am not, however, aware of any case, in which this point has been expressly determined. If such plea can be pleaded, the following rules ought to be attended to; first, that the thing given in satisfaction be of some value in contemplation of law²; hence, a release of an equity of redemption is not sufficient: secondly, if the debt arises by the performance or breach of the condition¹, and not by virtue of the bond, the accord and satisfaction must be pleaded in discharge of the condition, and not of the bond; lastly, if the debt arises upon an obligation without a condition², satisfaction by deed only can be pleaded; for the bond itself cannot be discharged without specialty.

Accord and payment of part before the day³, with a promise to pay the residue at a future day, which promise the obligee accepted in full satisfaction of the debt, is not a good plea; because the promise to pay is executory.

Although one bond cannot be pleaded in satisfaction of another⁴, yet payment of a less sum *before the day* in full satisfaction, and acceptance thereof in full satisfaction, may be pleaded in bar to debt on bond; because parcel of the debt, before the day, may be more beneficial to the obligee than the whole at the day, and the value of the satisfaction is not material. But care must be taken in this case to plead the payment of part to have been made in *full satisfaction*⁵; for if the plea states the payment of part *generally*, it will be bad.

3. *Duress.*

To debt on bond the defendant may plead, that it was obtained by duress of imprisonment (10). This plea admits the deed, and the proof of the issue lies on the defendant. If the defendant can prove that he was compelled to ex-

i Anon. Cro. Eliz. 46. cited in Com. Dig. Accord, (A. 1.)

k Preston v. Christmas, 2 Wils. 86.

l Neale v. Sheffield, Yelv. 192.

m S. C. Cro. Jac. 254. Preston v. Christmas, 2 Wils. 86.

n Balston v. Baxter, Cro. Eliz. 304.

o Cro. Eliz. 716. Hob. 68, 9. Cro.

Car. 85. Admitted in Pinnel's case,

5 Rep. 117. a.

p Id. Resolved.

(10) See the form of this plea in the Clerk's Assistant, 77.

ecute the bond, when he was under an arrest, without legal process^q, or by the process, or warrant of a person not having legal authority^r, it is sufficient. So if the arrest was by warrant from a justice of the peace, on a charge of felony, where there had not been any felony committed^s; or if the defendant, having been arrested under legal process, was forced by tortious usage in prison^t, it will be construed a duress.

The duress must be of the *person* (11) of the *defendant* or *his wife*^u; one, who is a surety only, cannot plead that the bond was obtained by duress of the principal^v, where the bond is joint and several^w. It has been observed, that duress must be pleaded, and cannot be given in evidence under the general issue *non est factum*; for a bond obtained by duress is not void, but voidable only.

To the plea of duress^x, the plaintiff may reply that the defendant was at large at the time of the execution^y, and that he sealed and delivered the bond voluntarily, and not by duress of imprisonment.

4. *Illegal Consideration,*

1. *By the Common Law—Immoral—In restraint of Trade, &c.*

2. *By Statute—Gaming—Sale of Office—Simony—Usury.*

1. *By the Common Law—Immoral.*—A bond may be avoided, if it has been made upon an immoral consideration; as where the condition of the bond was, that the obligee

^q Com. Dig. Plead. (2 W. 10.)

^r Id.

^s Aleyn, 92.

^t 2 Inst. 482.

^u Bro. Abr. Duress, pl. 13.

^x *Huscombe v. Standing*, Cro. Jac. 187. Adjudged on demurrer.

^y 1 Roll. Abr. 687. pl. 6.

^z Cl. Ass. 77.

(11) In 1 R. Abr. 687. p. 3. it is said, that if a person executes a deed by duress of his goods, he may avoid the deed; and 20 Ass. pl. 14. is cited, where a release made by an abbot, by duress, of his cattle, was holden void. But in *Sumner and Feryman*, Hil. 1708. cited in 2 Str. 917. it is said to have been holden, that a bond could not be avoided by duress of goods. See also Bro. Abr. Duress, pl. 16. S. P.

and obligor should live together in a state of fornication^a. But a bond given in consideration of past cohabitation with an unmarried woman, is good; because it shall be intended as a compensation for the wrong done^b (12).

In restraint of Trade.—With respect to bonds made in restraint of trade, it may be observed, that wherever a sufficient consideration appears to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained, provided the restraint is limited to a particular place; but, if the restraint is general, that is, not to exercise a trade throughout the kingdom, the bond is void (13).

In debt upon bond, the defendant prayed oyer of the condition^c, which recited, that the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in Liquorpond Street, in the parish of St. Andrew, Holborn, for the term of five years; and provided, that if the defendant should not exercise the trade of a baker within that parish, during the said term; or, in case he did, should within three days after proof thereof made, pay to the plaintiff the sum of 50*l.*, then the bond should be void. The defendant then pleaded, that he was a baker by trade, that he had served an apprenticeship to it, by reason whereof the bond was void; wherefore he traded, as it was lawful for him to do. On demurrer, the court adjudged the

^a Walker v. Perkins, 3 Burr. 1568. ^b Turner v. Vaughan, 2 Wils. 339.

¹ Bl. Rep. 517. S. C.

^c Mitchel v. Reynolds, 1 P. Wms. 181.

(12) See Marchioness of Annandale v. Harris, 2 P. Wms. 432. Priest v. Parrot, 2 Vez. 160. and Gray v. Mathias, 5 Ves. Jun. 286.

(13) "The general rule is, that all restraints of trade (which the law so much favours), if nothing more appear, are bad. This is the rule which is laid down in the famous case of Mitchel v. Reynolds, (which is well reported in 1 P. Wms. 181.; in which Lord Macclesfield took such great pains, and in which all the cases and arguments in relation to this matter are thoroughly weighed and considered.) But to this general rule there are some exceptions; as first, that if the restraint be only particular in respect to the time or place, and there be a good consideration given to the person restrained, a contract or agreement upon such consideration so restraining a particular person, may be good and valid in law, notwithstanding the general rule, and this was the very case of Mitchel v. Reynolds." Per Willes C. J. in the Master, &c. of Gunmakers v. Fell, Willes, 388. See further on this subject Gale v. Reed, 8 East, 86.

bond to be good, on the ground, that from the particular circumstances and consideration set forth, the contract appeared to be reasonable and useful, and that the restraint was a particular restraint, founded on a valuable consideration. See also the case of *Chesman v. Nainby*, 2 Str. 739. 3 Bro. P. C. 349. in which the courts of common pleas, king's bench, and house of lords, successively recognized the same principle, viz. that contracts entered into between two persons, to restrain one of them from setting up or exercising a particular trade or employment, *within a certain limited district*, and for a valuable consideration, were valid in law.

As to the limits within which a person may restrain himself from exercising his trade, it is impossible to lay down any rule for ascertaining in what cases such limits are reasonable and what not. In *Chesman v. Nainby*, the distance within which the obligor agreed not to exercise the same trade with the obligee, was half a mile only from the place where the obligee resided. In *Clerk v. Comer*, Cas. Temp. Hardw. 53. and 7 Mod. 230. 8vo. edit. S. C. by the name of *Colmer v. Clark*, the condition was not to carry on trade within the city of Westminster, or bills of mortality, and the bond was holden to be good. And in a more recent case of *Davis v. Mason*, 5 T. R. 118. where the defendant had bound himself not to practise as a surgeon within ten miles of the plaintiff's residence, the court did not think the limits unreasonable, and on the authority of *Mitchel v. Reynolds*, the bond, being founded on a valuable consideration, was adjudged good (14).

It is impossible to enumerate every species of illegality for which a bond may be avoided; but, before I close this head, I cannot forbear to mention one case relative to it, which underwent a long and serious discussion. The case alluded to is that of *Collins v. Blantern*^d, reported in 2 Wils. 347. It was an action of debt on bond, dated the 6th of April, 1765, in which defendant was jointly and severally bound with A. and B. in the penal sum of 700*l.*, conditioned for

^d Cited in 5 East, 293.

(14) In *Bunn v. Guy*, 4 East, 190. an agreement entered into by a practising attorney in London, to relinquish his business and recommend his clients to two other attorneys, and that he would not himself practise in such business *within London and 150 miles from thence*; and that he would permit them to make use of his name in their firm for one year; was holden to be a valid agreement.

the payment, by A. and B. and the defendant, of the sum of 350*l.* on the 6th of May following. The defendant, having prayed oyer of the bond and condition, pleaded that two of the obligors, A. and B., and three other persons, stood indicted by John Rudge, on five several indictments, for wilful and corrupt perjury, and had severally pleaded not guilty; that the several traverses on the indictment were coming on to be tried at the assizes in Stafford, whereupon it was unlawfully and corruptly agreed, between Rudge the prosecutor, the plaintiff, and the five persons indicted, that the plaintiff should give Rudge his note for 350*l.*, payable one month after date, for not appearing to give evidence at the trial, and the obligors should execute a bond to the plaintiff, of the same date with the note, as an indemnity to the plaintiff for giving such note. The plea then stated the carrying this agreement into effect, on the 6th of April, 1705, and concluded with an averment, that the bond was given for the said consideration, and no other, and that the obligors were not indebted to the plaintiff in any sum of money, and therefore the bond was void in law. On demurrer, the court gave judgment for the defendant on these grounds: 1st, That the whole transaction was to be considered as one entire agreement; for the bond and note were both dated upon the same day, for payment of the same sum of money on the same day; that it was an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the commonwealth; that the promissory note was certainly void, and consequently the plaintiff was not entitled to recover upon the bond which was given to indemnify him from such note; they were both bad^e, the consideration for giving them being wicked and unlawful. 2dly, That the bond was void, because it was given for the purpose of tempting a man to transgress the law. 3dly, That the special matter might be pleaded, although it was objected, that the law would not endure a fact in *pais dehors* a specialty to be averred against it, and that a deed could not be defeated by any thing less than a deed; for the condition in this case was for the payment of a sum of money; but, that payment was to be made, was grounded upon a vicious consideration, which was not inconsistent with the condition (15), but struck at the con-

^e S. P. admitted per Cur. in *Cuthbert v. Haley*, 8 T. R. 390.

(15) "The general rule, that matter dehors the deed cannot be pleaded, does not apply to this case, the true meaning of that rule

tract itself, in such a manner as shewed that the bond never had any legal entity, and if it never had any being at all, then the maxim, that a deed must be defeated by a deed of equal strength, did not apply to this case. The averment pleaded in this case was not contradictory to, but explanatory of, the condition: as to the argument, that if there was not any consideration for the bond it was a gift; that was to be repelled by shewing it was given upon a bad consideration: this destroyed the presumption of donation. 4thly, That the plea was properly concluded, "and so the said bond is void," or at least this conclusion was well enough upon general demurrer.

In debt on bond, conditioned for the payment of a sum of money in case the defendant did not procure I. S., then *impressed*; to appear and deliver himself to the plaintiff when called upon^f. The defendant pleaded that I. S. having been *unlawfully impressed*, the plaintiff was unwilling to discharge him, unless he would agree to pay a certain sum of money, and would procure the defendant to become bound, and thereupon it was unlawfully agreed, that the plaintiff should discharge I. S. on the defendant becoming bound for that sum, and, therefore, the bond was void. To this plea there was a general demurrer, which was endeavoured to be supported, on the ground, that the defendant could not aver matter inconsistent with the condition of the bond; that it appeared by the condition, that the party was impressed, which meant legally *ex vi termini*. But the court overruled the demurrer, and held the plea to be good.

^f Pole v. Harrobin, E. 22 G. 3. B. R. 9 East, 416. n.

is, that matter inconsistent with or contrary to the deed, cannot be alleged*, but matter consistent with the deed may; the bond in the present case is for the payment of money; the plea admits this, and the averment alleges upon what consideration that money was to be paid, and therefore is not consistent with, or contradictory to, the condition of the bond; this rule of pleading applied to the cases of simony, duress, coverture, infancy, &c." Argument for defendant, S. C. 2 Wils. 347. "Since the case of Pole v. Harrobin, E. 22 G. 3. B. R. it has been generally understood, that an obligor is not restrained from pleading any matter, which shews that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond." Per Ld. Ellenborough C. J. in Paxton v. Popham, 9 East, 421, 2.

* Buckler v. Millerd, 2 Ventr. 107. Mease v. Mease, Cowp. 47.

So where the condition of the bond stated, that the defendants had *taken up, borrowed, and received* of the plaintiffs, a sum of money, which was to run at *respondentia* interest^g, on the security of certain goods shipped from Calcutta to Ostend. The defendants pleaded, that the bond was given to cover the price of goods sold by the plaintiffs to the defendants, for the purpose of an illegal traffic from the East Indies, and that the plaintiffs knowingly assisted in preparing the goods for carriage upon such illegal voyage. On demurrer to this plea, it was urged, in support of the demurrer, that the matter in the plea being directly inconsistent with the matter stated in the condition, it ought to have been averred in the plea, that the statement in the condition was merely colourable; but the court overruled the objection, and held the plea to be good: Lord Ellenborough C. J. observing, that upon the adjustment of the account, after the goods were sold, the parties might have calculated upon the debt as upon a loan to that amount, and therefore there was not any necessary inconsistency between the two statements; even taking the case upon the strict rule of law, as it had been generally considered before the case of *Collins v. Blantern*, but since that case there could not be any doubt upon it. And Le Blanc J. observed, that after the cases, breaking in upon the old rule, had determined, that though the bond state nothing illegal upon the face of it, the obligor may shew by his plea, that it was given for an illegal consideration, they had in effect decided, that he may shew an illegal consideration, different from the consideration stated in the condition. And when the plea states, that the bond was given to cover the price of goods illegally contracted to be sold and shipped, it does in effect deny that it was given for money borrowed; and it shews that the statement in the condition was made colourably in order to cover the illegal agreement.

2. *By Statute*.—Where the consideration on which the bond is given is illegal by statute, the defendant may take advantage of it by pleading. And if the bond contain several conditions, although one of the conditions only be void by a statute, yet the whole bond is void^h.

Gaming.—By stat. 9 Ann. c. 14. s. 1. “ All bonds executed
“ by any person, where the whole or any part of the consi-
“ deration is for money, or other valuable thing, won by
“ gaming or playing at cards, dice, tables, tennis, bowls, or
“ other game; or by betting on the sides or hands of such

^g *Paxton v. Popham*, 9 East, 403.

^h *Norton v. Syme*, Moor, 856.

“ as game at any of the said games; or for repaying any money knowingly lent or advanced for such gaming or betting; or lent or advanced at the time and place of such play, to any person so gaming or betting, or that shall during such play so game or bet, shall be void.”

In a plea upon this statute, it must be shewn at what play or game the money was lost; because that is matter of law and not merely evidenceⁱ; and the particular game specified must be proved^k.

Sale of Office.—By stat. 5 and 6 Edw. 6. c. 16. s. 2. and 3.
 “ If any person take any bond to receive any money, fee, reward, or other profit, directly or indirectly, for any office or offices, or any part of them, or to the intent that any person should enjoy any office, or the deputation of any office, or any part thereof, which office, or any part, shall in any wise touch the administration or execution of justice; or the receipt, controlment, or payment of any of the king's money, revenue, account, aulnage, auditorship, or surveying any of the king's lands, tenements, or hereditaments; or any of the king's customs, or any other administration or necessary attendance in any of the king's custom-houses, or the keep of any of the king's towns, castles, or fortresses, being used or appointed for a place of strength and defence; or which shall touch any clerkship to be occupied in any manner of court of record, wherein justice is to be ministered, every such bond shall be void against the person making it.”

The 4th section provides against the extension of this act to any office, whereof any person is seised of any estate of inheritance, and any office of parkership, or of the keeping of any park, house, manor, garden, chase, or forest.

If defendant is desirous of taking advantage of the preceding statute^l, he must plead it specially, in order that the plaintiff may have an opportunity of shewing that he is within the exceptions of the statute,

There were two principal reasons for making this statute^m, 1st, that offices might be exercised by persons of skill and integrity; 2ndly, that they might take only the legal fees; for, those who buy their offices will be apt to take more than their legal fees, according to what is said in 3 Inst. 148. “ they that buy will sell.”

The office of register of an archdeaconry is an office with-

ⁱ Colborn v. Stockdale, 1 Str. 493.

^l Hornby v. Cornford, Fitzgib. 45.

^k Mazzinghi v. Stephenson, 1 Camp. m Willes, 573, 4. N. P. C. 291.

in this statute^a, because it is an office concerning the administration of justice. So is the office of auditor of Wales^c; so, as it seems, is the office of under-sheriff^p.

Where an office is within the statute, and the salary is certain, if the principal makes a deputation, reserving a lesser sum out of the salary, and take a bond conditioned for the payment of such lesser sum, such bond is not within the statute^a. So if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a sum certain out of the fees and profits of the office, it is good^r; for in these cases the deputy is not to pay, unless the profits amount to so much; and though a deputy, by his constitution, is in place of his principal, yet he has not any right to the fees, which still continue to be the principal's; so that as to him, it is only reserving a part of his own, and giving away the rest to another^s; but where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events, and a bond conditioned for the payment of such sum is void by the statute.

So where, by the condition of the bond it appeared, that A. had granted to B. and C.^t (the son of A.) the office of register of an archdeaconry for their lives, and the terms of the condition were, 1st, that B. should permit C. to receive *all* the profits of the office; and, 2dly, that B. should surrender the office and profits whenever C. should require it; it was holden, that this condition was within the provision of the statute, and made the bond void; first, because an agreement to have all the profits was an agreement to receive *some* profit, which was contrary to the words of the statute; secondly, because either B. must execute the office for nothing, or he must take more than his legal fees; that a person of skill, and of integrity, would not execute such an office for nothing; and if he had any thing for it, it must be by extortion, and by taking illegal fees, and thereby the principal end of the statute would be eluded. As to the 2d branch of the condition, viz. that B. should surrender the office at the request of C.; the court said, that it was unnecessary to decide upon that, inasmuch as it had been holden, in Norton v. Syms, Moore, 856, and Lee v. Colshill, Cro.

ⁿ Woodward v. Fox, 3 Lev. 289. Layng v. Paine, Willes, 571. S. P. ^r Ib and Gulliford v. De Cardonell, Salk. 466.

^o Godolphin v. Tudor, Salk. 468.

^s Adjudged in Godolphin, v. Tudor,

^p Browning v. Halford, Freem. 19.

Salk. 468.

^q Per Cur. in Godolphin v. Tudor, Salk. 468. ^t Layng v. Paine, Willes, 571.

Eliz. 529., that if any of the conditions are void *by statute*, the whole bond is void. They intimated, however, a clear opinion that this branch of the condition was void also; for the donor thereby reserved to himself an absolute power over his officer, which he ought not to do. Besides, if this were allowed, there would be a plain method chalked out to evade the statute; for any one by this mean might sell an office for the full value. For let such a condition be put in, let the bond be given for the full value of the office, and let it be agreed between them, that the officer shall refuse to surrender upon request, and then the grantor will recover on the bond, and so have the full value of the office.

A. by the interest which he had with the commissioners of excise^a, procured for B., his brother, a supervisor's place in that office, and in consideration thereof, B. gave a bond for the payment of 10% per annum to A., by half yearly payments, as long as B. should continue in the office. B. died, having for some years omitted the payment of this annual sum of 10%, whereupon A. brought an action on the bond against the widow and executrix of B., who pleaded a sham plea of payment, and brought a bill in equity to be relieved against the bond. For the defendant it was objected, that the bond was admitted to be good at law, by the plaintiff's not having been advised to plead the statute of 5 and 6 Edw. 6. against the sale of offices; neither truly in this case could the stat. have been pleaded, being made long before the excise became a branch of the revenue; that the law being with the defendant, it would be hard to take the benefit thereof from him, especially when he was not plaintiff in equity, did not pray any aid of that court, and had not been guilty of any fraud. But by Lord Talbot Ch. bonds of this nature are highly to be discouraged; merit, industry, and fidelity, ought to recommend persons to these places, and not interest with the commissioners, who, it is to be presumed, had they known from what motive the plaintiff at law applied to them on behalf of his brother, would have rejected him. The officers giving money to a friend of the commissioners, for his interest, is altogether as bad as giving money, or a bond for money, to the commissioners themselves, which undoubtedly would have been relieved against. It is a fraud on the public, and would open a door for the sale of offices relating to the revenue. The taking away from the officer, what the commissioners and the treasury think to be but a reasonable reward for his care and trouble, and an encouragement to his fidelity,

^a Law v. Law, 3 P. Wms. 391. and Ca. Temp. Talb. 140.

must needs be of the most pernicious consequence, and induce him to make it up by some unlawful means, such as corruption and extortion; and though the excise was no part of the revenue at the time of making the statute of 5 and 6 Edw. 6., yet there may be good ground to construe it within the (16) reason and mischief of the law, which is rather remedial than penal.

Simony.—Simony is the corrupt presentation of a person to an ecclesiastical benefice for money, &c.

Every contract made for or about any matter or thing, which is prohibited and made unlawful by any statute^x, is a void contract, although the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are not any prohibitory words in the statute. Hence, in the case of simony, although the statute (31 Eliz. c. 6.) only inflicts a penalty by way of forfeiture, and does not mention any avoiding of the simoniacal contract, yet it has

^x 31 Eliz. c. 6. 12 Ann, stat. 2. c. 12. Per Holt C. J. in *Bartlett v. Viner*, Carth. 252.

(16) It is no new thing, but usual, that an interest raised by a subsequent statute should be under the same remedy and advantage as an interest existing before. Thus at common law, no acceptance of a collateral recompence could bar a wife of her dower; but the stat. of 27 H. 8. made a jointure to be a bar, which at that time extended only to a jointure made by act executed in the husband's life-time. Afterwards the 32 of H. 8. enabled a man to devise his lands, when it was holden, that if a man were to devise lands to his wife in satisfaction of her dower, and she should accept them, this would be a bar within stat. 27 H. 8. 4 Rep. 4. a. b. because it is within the same equity and reason, and the diversity is in the manner only, not in the thing. So exchequer bills, though created and made valuable by a statute subsequent to that of 12 Car. 2. c. 30. for erecting the post-office, yet are portable within the intent of the said act of 12 Car. 2. and on a letter in which such bills were enclosed being lost out of the office, the post-masters were holden chargeable. From the Lord C. Justice Holt's argument in the case of *Lane v. Cotton and Frankland*, in the reporter's (P. Wms.) MSS. See also Salk. 17. And it is observable, that though the other three judges of B. R. differing in opinion with the Chief Justice, judgment was given in that case for the defendants; yet on a writ of error being brought in the Exchequer Chamber, the defendants are said to have made satisfaction to the plaintiff, which put an end to all further proceedings.

been always holden, that such contracts, being against law, are void.

For the better understanding the nature of simoniacal contracts, it will be proper to set forth the legislative provisions against simony.

By stat. 31 Eliz. c. 6. for the avoiding simony and corruption in presentations, collations, and donations, of and to benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions, institutions, and inductions to the same, it is enacted, that “ if any
 “ person or persons” (17), or bodies corporate, shall, for
 “ money, reward, gift, profit, or benefit, directly or indi-
 “ rectly, or for or by reason of any promise, agreement, grant,
 “ bond, covenant, or other assurance of or for any money,
 “ &c. directly or indirectly, present or collate any person
 “ to any benefice, with cure of souls, dignity, prebend, or
 “ living ecclesiastical, or bestow the same for any such
 “ corrupt consideration, every such presentation, &c. and
 “ every admission, institution, investiture, and induction,
 “ thereupon, shall be void; and it shall be lawful for the
 “ crown (18) to present, &c. to such benefice, &c. for that
 “ one turn only, and every person, &c. that shall give or
 “ take such money, &c. or take or make any such promise,
 “ &c. or other assurance, shall forfeit the double value of
 “ one year’s profit of such benefice, &c. and the person so
 “ corruptly taking, &c. such benefice, &c. shall thenceforth
 “ be adjudged a disabled person to have the same” (19).

“ If any person shall for money”, &c. (other than for
 “ lawful fees) or for any promise, &c. or other assurance
 “ for money, &c. directly or indirectly admit, institute, in-
 “ stall, induct, invest, or place any person in any benefice,
 “ with cure of souls, dignity, prebend, or other living ec-
 “ clesiastical, every such offender shall forfeit double the
 “ value of one year’s profit of such benefice, &c., and the
 “ same benefice, &c. shall be void, and the patron, &c. shall

y S. 5.

z S. 6.

(17) Usurpers, as well as persons having title to present or collate, are within this statute. 1 Inst. 120. a. 3 Inst. 153.

(18) If the corrupt presentation or collation is by an usurper, then the king shall not present, but the rightful patron. 3 Inst. 153, 154. 1 Inst. 120. a.

(19) Where the presentee is not privy to the corrupt contract, he shall not be adjudged a disabled person, 3 Inst. 154.

“ present or collate unto the same, as if the party so admitted, &c. were dead.”

The 7th section provides, that no title to confer or present by lapse, shall accrue upon any voidance mentioned in this act, but after six months next after notice given of such voidance, by the ordinary to the patron.

By the 8th section, it is enacted, that “ If any incumbent of any benefice, with cure of souls, shall *corruptly* resign or exchange the same, or corruptly take for the resigning or exchanging the same, directly or indirectly, any pension, money, or benefit, as well the giver as the taker thereof shall lose double the value of the sum so given, the one moiety as well thereof as of the forfeiture of double value of one year's profit to be to the crown; and the other to him that will sue for the same, by action of debt, bill, or information, in any of the king's courts of record.”

The next statute relating to this subject is, the 12 Ann. stat. 2. c. 12. by the second section of which it is enacted, that “ if any person shall, for money or profit, or for any promise, agreement, &c. or other assurance for money, &c. directly or indirectly, in his own name, or the name of any other person, procure the next presentation to any ecclesiastical living, and shall be presented or collated thereupon, every such presentation and admission, &c. shall be void, and such agreement shall be deemed a simoniacal contract; and it shall be lawful for the crown to present for that turn only; and the person so corruptly accepting such living, shall thenceforth be disabled to enjoy the same” (20).

Having thus set forth the material provisions of the statutes against simony, it only remains to state briefly the determinations which have been made in respect of bonds given by clerks to patrons, on receiving a presentation to a living; and first, it has been holden, that if the patron takes of the clerk a bond conditioned for the performance of a legal act, as to pay a sum of money to the son of the last incumbent for a certain time^a; to resign when the patron's

^a Baker v. Monford, Noy, 142.

(20) The purchase of an advowson in fee, where no privity of the clerk intended to be presented appears, has been holden not to be simoniacal; although the incumbent was *in extremis* at the time when the purchase was made. Barret v. Glubb, 2 Bl. Rep. 1052.

nephew attains his full age^b; to resign on three months notice to be given by the patron, in order that the patron's son may be presented, and to keep the buildings on the living in repair^c; to reside on the living, or to resign, in case of not returning after notice, and also not to commit waste, &c. on the parsonage house^d; such bond is good, and cannot be avoided on the ground of simony.

2dly. With respect to general resignation bonds, or bonds conditioned to resign at the request of the patron, without expressing the object for which such resignation is intended, it may be observed, that a long train of solemn decisions from the 8th year of James the First, to the 28th of George the Second^e, (a period of 145 years) had established that such bonds were legal; because it was possible that they might have been taken with an honest intent (21), as for the purpose of providing for a son, or enforcing residence or good behaviour, conditions, which might rather argue care in the patron, than any corruption of simony (22). Whilst, however, the courts of common law held these bonds to be valid, the courts of equity took care that an improper use should not be made of them; and whenever the patron put

^b Per Lord Macclesfield in *Peel v. Capel*, Str. 534.

^c 4 T. R. 359.

^d *Ib.* 78.

^e *Johues v. Lawrence*, 8 Jac. adjudged on error in the Exchequer Chamber, Cro. Jac. 248. and 274. S. C. *Babington v. Wood*, Cro. Car. 180. Sir W. Jones, 220. *Watson v. Baker*, T. Raym. 175. *Peel v. Com. Carlisle*, 6 G. Str. 227. *Wyndham v. Boyer*, T. 27 G. 2. *Hesketh v. Gray*, B. R. Hil. 28 G. 2. Amb. 268.

ton v. Wood, Cro. Car. 180. Sir W. Jones, 220. *Watson v. Baker*, T. Raym. 175. *Peel v. Com. Carlisle*, 6 G. Str. 227. *Wyndham v. Boyer*, T. 27 G. 2. *Hesketh v. Gray*, B. R. Hil. 28 G. 2. Amb. 268.

(21) In the case of the *Bishop of London v. Ffytche*, 1 East, 487. Mr. Justice Buller (adopting the remark of Bp. Stillingfleet) observed on the inconclusiveness of this argument, by saying, that it might with equal force be argued, that the bond might be made use of for bad purposes. Alluding to the cases, Mr. J. Buller said, "I have taken no small pains to find out on what principle those decisions were founded; but without much effect; for, after all the labour I have bestowed upon the subject, it does seem to me that they are destitute of all sense, reason, or principle. But still *they are so numerous, they have arisen at so many different periods, all the judges for near two centuries past have been so uniformly of the same opinion, the law has been received, not only in Westminster Hall, but through the whole kingdom as so firmly settled, and mankind have so universally acted upon that idea, that I think it would be very dangerous to overturn or even to shake it, &c.*"

(22) In 1698, Bishop Stillingfleet wrote an elaborate discourse against these decisions of the courts of common law.

such bonds in suit for an illegal purpose, *e. g.* to discharge himself from a claim of tithe^f, or the like purpose, injunctions were granted to stay proceedings in the action on the bond (23).

Notwithstanding the long series of decisions before mentioned, the question, as to the validity of a general resignation bond, was, in the year 1781, again agitated in the case of *Ffytche v. the Bishop of London*, and although the courts of Common Pleas and King's Bench^g, as the case came respectively before them, considered themselves as bound by the current of authorities, and decided in favour of the bond, yet upon a writ of error being brought in parliament, their judgment was reversed^h, contrary to the opinion of all the judges except Eyre C. B., upon the motion of Lord Thurlow Ch. the division being 19 against 18 peers (24).

^f *Durston v. Sandys*, 1 Vern. 411, 412.

^g Rep. in Ch. 398. 2 Ch. Cas. 186.

^h in error from C. B. are reported in 1 East, 487.

^g The proceedings in the King's Bench

^h On the 30th May, 1783.

(23) There does not appear to have been any difference in this respect between a special and general bond of resignation; for in *Peel v. Capel*, Str. 534. where the patron put a special bond of resignation in suit, for the purpose of enforcing the payment of a sum of money from the clerk, the Court of Chaucery granted an injunction.

(24) The proceedings in the House of Lords are reported very fully and accurately in Cunningham's Law of Simony. This assertion of the correctness of Cunningham's report is hazarded on the authority of Mr. East, who had an opportunity of comparing it with a MS. note of the late Mr. J. Buller. See 1 East's R. 487. n. (a.)

The ground of the decision in the House of Lords against the validity of these bonds appears to have been, that they were simoniacal and against the statute 31 Eliz., and not that they were contrary to the general principles of the common law. In cases, therefore, where the statute against simony does not apply, the court of King's Bench have, notwithstanding the decision in *Ffytche v. Bishop of London*, considered themselves as bound by prior authorities. Hence it has been holden, that a bond given by a schoolmaster of an ancient public school, who had a freehold in his office, to resign at the request of his patron, was good. *Leph v. Lewis*, 1 East's R. 391. And even in cases, where the statute against simony applies, if they are not precisely the same with that of *Ffytche v. the Bishop of London*, the court of King's Bench has evaded the authority of that decision in the House of

Usury.—To debt. upon bond the defendant may plead, that the bond was given upon an usurious contract.

The statute against usury cannot be given in evidence on the general issue, but must be pleadedⁱ; for although it may appear to be usury on the condition, yet plaintiff may rectify it by his replication. The provisions of the legislature relating to usury, are as follow: by stat. 37 H. 8. c. 9. (by which all former statutes against usury are repealed) s. 3. “no person by way of corrupt bargain, loan, &c. or other means, shall take for forbearance of 10*l.* or other thing due for wares, &c. for one whole year above 10*l.* per centum, and so *pro ratâ*, &c.” By stat. 13 Eliz. c. 8. (by which 5 and 6 Edw. 6. c. 20. for repeal of the stat. 37 H. 8. c. 9. is repealed, and, consequently, stat. 37 H. 8. c. 9. is revived) “all bonds, contracts, and assurances^k, collateral or other, to be made for payment of any principal, or money to be lent, or covenant to be performed upon, or for any usury in lending or doing any thing against the act 37 H. 8. c. 9. upon or by which loan, &c. there shall be reserved or taken above the rate of ten pounds for the hundred for one year, shall be utterly void.” In stat. 21 Jac. c. 17. s. 2. this clause is repeated almost verbatim, but the rate of interest allowed to be taken is reduced to 8*l.* in the hundred. The same clause is again repeated in stat. 12 Car. 2. c. 13. s. 2. where the rate of interest is reduced to 6*l.* per centum. And, lastly, by stat. 12 Ann. st. 2. c. 16. (the last statute on this subject) all bonds, contracts, and assurances, for payment of any principal or money to be lent, or covenanted (25) to be performed upon or for any usury, whereupon or whereby there

ⁱ Per Cur. Hob. 72. 5 Rep. 119 a. ^k 13 Eliz. c. 8. s. 3.
Geaug v. Swaine, 1 Lutw. 466.

Lords, and determined according to the established series of precedents. See *Partridge v. Whiston*, 4 T. R. 359.

However erroneous the first determination on general resignation bonds might have been, yet as the law on this point was considered as settled by a long train of decisions, and as courts of equity were ready to interpose for the purpose of correcting any evil which might arise from the abuse of such bonds, it certainly may admit of a question, whether it was *expedient* to overturn so many solemn adjudications, and thereby to add another topic to the never failing theme of the uncertainty of the law.

(25) Should it not be printed “covenant?” See the stat. 13 Eliz. c. 8.

shall be reserved or taken above the rate of 5*l.* in the hundred, shall be utterly void.

In pleading usury, it is not necessary to recite the statute^l; but, in framing the plea, care must be taken, 1st, that it should state, "that it was corruptly agreed^m, &c.;" 2ndly, that the usurious agreement be particularly set forth, and the quantum of interest agreed to be givenⁿ: 3dly, that the same exactness be observed in stating the agreement, so that it may correspond with the evidence, as in other cases of contract; for, in a case where the agreement was for the forbearance of money until one or other of two days, and the plea, instead of stating it in the alternative, stated it as an absolute forbearance until one of those days, the variance was holden fatal^o: 4thly, the plea must aver, that the agreement was to pay such a sum for giving day of payment; merely stating, that the sum, agreed to be given for giving day of payment, exceeded the rate of legal interest, is not sufficient^p.

It is to be observed^q, that although a security tainted with usury in its inception may be avoided, even in the hands of an innocent purchaser for a valuable consideration without notice, yet a subsequent usurious contract will not avoid a security, which was good at the time when it was made (26).

A substituted security, which has been given for a security contaminated by usury, is void, if such substituted security be given either to the party to the original contract, or to his personal representative^r. But, where the original usurious security has been transferred by the party to whom it was given to another person, ignorant of the usury, and such other person accepts from the original debtor another security, which renders the first security void, the second security is available in the hands of such innocent person. Hence where A. for an usurious consideration^s gave his promissory note to B., who transferred it to C. for a valuable

^l Bro. V. M. 255. cited in Com. Dig. Pleader, (2 W. 23.)

^m Nevison v. Whitley, Cro. Car. 501.

ⁿ Hinton v. Roffee, 2 Show. 329.

^o Tate v. Wellings, 3 T. R. 538.

^p Swales v. Bateman, W. Jones, 409.

^q Ferrall v. Shaen, 1 Saund. 294.

^r Admitted per Cur. in Cuthbert v. Haley, 8 T. R. 392, 394.

^s Cuthbert v. Haley, 8 T. R. 390.

(26) The same rule holds in the case of a bill of exchange; if good in its inception, usury in the intermediate endorsements will not avoid it in the hands of a *bond fide* holder. Parr v. Eliason, 1 East's R. 95. Daniel v. Cartony, 1 Esp. N. P. C. 274. S. P. ante p. 290.

consideration without notice of the usury, and afterwards A. gave C. a bond for the amount, it was holden, that in an action brought by C. against A. on the bond, the bond could not be avoided on the ground of the usurious contract between A. and B.

In an action of debt on a bond^t, to which usury was pleaded, it appeared that the plaintiff had lent the defendant 1000*l.* for the securing of which, with lawful interest, a bond was given, and the defendant also agreed to give the plaintiff a salary of so much a-year, as a clerk in his brewery. It was not intended, that the plaintiff should perform any service for the defendant there, but the salary was a mere shift, to give the plaintiff more than 5 per cent. interest for his money. One year's salary having been paid, the parties agreed, that it should be deducted from the principal, the deed securing this salary cancelled, and a fresh bond taken for the remaining principal, with 5 per cent. interest, and on this bond the action was brought. Lawrence J.—“The original contract between these parties was certainly usurious, and no action could have been maintained on the first bond; but there was nothing illegal in the last bond: it was not made to assure the performance of the first contract, nor does it secure more than five per cent. interest to the plaintiff. The parties saw they had before done wrong; they rectified the error they had committed, and substituted for an illegal contract, one that was perfectly fair and legal. I see no objection to their doing that, and therefore am of opinion, that the present action is maintainable.” Verdict for plaintiff.

The reader should be apprized that there was a contrary decision, by Chambre J. on this point, viz. Barnes v. Hedley, London sittings, M. 48 G. 3. 1 Camp. N. P. C. 157.; but the preceding opinion of Lawrence J. seems to be the better opinion; and the case of Barnes v. Hedley having been brought under consideration in the Court of Common Pleas, it was solemnly determined, that after the usurious securities had been cancelled by consent, a promise by the borrower to repay the principal and legal interest was binding^u.

5. *Infancy.*

An infant may bind himself by a single bill^x to pay for necessaries; but if he enters into an obligation with a penalty,

^t Wright v. Wheeler, Worcester Spring Assizes, 1799. 1 Camp. N. P. C. 165. ^x 1 Inst. 172. a. Russell v. Lee, 1 Lev. 86.

^u Barnes and others v. Hedley, 2 Taunt. 194.

such obligation may be avoided by a *plea of infancy*^r (27); but infancy cannot be given in evidence under the general issue, *non est factum*^s.

An infant cannot give a security for interest^a; consequently to a bond with a penalty conditioned for payment of interest as well as principal, infancy may be pleaded in bar.

6. *Payment—Solvit ad Diem—Solvit post Diem, and Evidence thereon.*

Payment.—At the common law, it was a general rule, that where an action was grounded on a deed, the defendant could avoid it by matter of as high a nature only, as by an acquittance under seal. Hence to debt on a single bill, payment merely without an acquittance could not *properly* (28) be pleaded^b. But now by stat. 4 Ann. c. 16. s. 12. where debt is brought on any single bill, if the defendant

^y *Ayliffe v. Archdale*, Cro. Eliz. 920.
Moor, 679. S. C.

^a *Fisher v. Mowbray*, 8 East, 330.
^b Doct. Plac. 107.

^s *Whelpdale's case*, 2d Res. 5 Rep. 119. a.

(27) Whether such obligation be void or voidable appears to be a *verata quæstio*. See *Morning v. Knopp*, Cro. Eliz. 700. Authorities tending to shew that it is void, are, *Noy's Rep.* 85. *Delavel v. Clare*.—3 Com. Dig. 163. (C. 2.)—*Bull. N. P.* 182. “If an infant become indebted for necessaries and give a bond in a penalty for the money, it will not extinguish the simple contract debt; *for the bond is void*” (supposing such a bond to have been void at common law on the ground of its being manifestly prejudicial to the infant, *quære*, has the stat. 4 Ann, c. 16. s. 13. made any alteration in the law in this respect?). Authorities tending to prove that such obligation is voidable only, are, *Edmund's case*, 1 Leon. 114.—2 Rol. Abr. 146. (A.) 4.—*Litt. s.* 259.—*Perk. s.* 12.—1 Bl. Com. 466.—*Tapper v. Devenant* as reported in 3 Keb. 798. but not as reported in *Bull. N. P.* 155.—*Salk.* 279. per Treby C. J.

(28) In *Nichol's case*, M. 37 & 38 Eliz. 5 Rep. 43. a. to debt on a single bill, the defendant pleaded payment without acquittance, on which issue was joined and found for the plaintiff. It was holden, that, although payment without acquittance was no plea, and that issue was joined on a thing not material; yet forasmuch as there was an issue joined on an affirmative and negative, which issue was found for the plaintiff, it was expressly helped by the statutes of jeofails, 32 H. 8. c. 30. and 18 Eliz. c. 14.

has paid the money due thereon, such payment may be pleaded in bar.

To debt on bond *with a condition* for the payment of money on a day certain, the defendant (having craved oyer of the condition) might, even at common-law, have pleaded payment at the day^c; because such plea was in effect a plea of performance of the condition merely.

Solvit ad diem.—A plea of payment, from the language of the plea, when the pleadings were drawn in Latin, has obtained the name of a plea of *solvit ad diem*.

This plea is the proper form of plea, as well where the money has been paid *before* the day, as where it has been paid *at* the day. Indeed in the case of a bond conditioned for payment *at* a day certain, if the money has been paid *before* the day, *solvit ad diem* is the only proper plea^d; for if the defendant, agreeably to the fact, should plead payment *before* the day, and issue should be joined thereon, and a verdict found for the plaintiff, and judgment accordingly; such judgment may be reversed on error; because there would still remain a possibility that the money was paid *at* the day, in which case the plaintiff would not have had any cause of action. Hence in the case of a payment *before* the day, the defendant must plead a payment *at* the day; and then, if issue is joined thereon, proof of payment before the day will be sufficient to support the defendant's plea^e (29).

Where a bond is conditioned for the payment of money on or *before* such a day^f, the defendant may plead payment before the day, if the fact be so; and the plaintiff ought not to demur to such plea, as tendering an immaterial issue (30).

^c Doct. Pl. 107.

^d *Holms v. Broket*, Cro. Jac. 434. *Merril v. Josselyn*, 10 Mod. 147. *Jernegan v. Harrison*, Str. 317.

^e *Bond v. Richardson*, Cro. Eliz. 142.

Dyer, 222 b. S. C. in marg. See also Doctr. Pl. 181.

^f *Fletcher v. Hennington*, 2 Burr. 944. and 1 Bl. R. 210.

(29) "In the case of a bond conditioned for payment at a certain day, there cannot properly be any legal performance of the condition, but by payment at the day. *Payment before the day may indeed be given in evidence on solvit ad diem*, but that proceeds upon this notion, that the money is considered as a deposit in the hands of the obligee until the day arrives, and then it is actual payment." Per Lord Hardwicke C. J. in *Tryon v. Carter*, T. 7 G. 3. B. R. 7 Mod. 231. Leach's Ed.

(30) "If no payment has in fact been made, the proper replication in this case is, that the money was not paid at the day men-

But if to a bond so conditioned^a, the defendant pleads payment on the day, and *issue is joined thereon*, and verdict for the plaintiff, a repléader must be awarded, as being an immaterial issue; for such verdict does not find any breach of the condition, because the money might have been paid before the day, which would have been a performance of the condition.

Solvit post diem.—The bond being forfeited by the non-payment of the money on the day mentioned in the condition, a payment *after* the day could not be pleaded at the common law; but now by stat. 4 Ann. c. 16. s. 12. “where
“ debt is brought upon any bond, with a condition or de-
“ feasance to make void the same upon payment of a lesser
“ sum at a day or place certain, if the obligor, his heirs, exe-
“ cutors, or administrators have, *before the action brought*,
“ paid to the obligee, his executors, or administrators, the
“ principal and interest due by the condition or defeasance,
“ though such payment was not made strictly according to
“ the condition or defeasance, yet it may be pleaded in bar
“ of such action.”

The form of plea under this statute (usually termed a plea of *solvit post diem*) is, *that the defendant after the day mentioned in the condition, and before the commencement of the plaintiff's action, paid the money mentioned in the condition, with interest, according to the form of the statute, &c.*

N. This statute is confined to absolute payments^b. Hence a tender and refusal of principal and interest *after* the day, and before action brought, cannot be pleaded.

Evidence.—If a bond has lain dormant for twenty years or more, without payment of any interest (31), or any de-

^a Tryon v. Carter, Str. 994. 7 Mod. ^b Underhill v. Matthews, Ball. N. P. 231. Leach's Ed. 171.

tioned in the plea, nor at any time before or after the making of the obligation.” Per Denison J. 1 Bl. R. 210. and 2 Burr. 945.

(31) “If interest has been paid after the day appointed for payment, the presumption of the bond having been satisfied *at* the day is destroyed, and consequently the plea of *solvit ad diem* cannot be supported, although more than twenty years have elapsed since the payment of the interest. In this case, the defendant, in order to take advantage of the presumption arising from length of time since the payment of the interest, ought to plead *solvit post diem*.” Per Ld. Raymond C. J. Moreland v. Bennett, Str. 652.

mand having been made, or any circumstances to account for the acquiescence, this will be evidence sufficient of itself, for a jury to presume that the bond has been satisfied (32), and will entitle the defendant to a verdict, under the plea of *solvit ad diem*. But where a bond has lain dormant for a less time than twenty years (33), some other evidence than the mere length of time must be given, in order to raise

(32) "This doctrine of twenty years presumption was first laid down by Lord Hale, who thought it merely a circumstance whence a jury might presume payment. In this opinion he was followed by Lord Holt, who held, that if a bond be of twenty years standing, and no demand proved thereon, or good cause for so long forbearance shewn, on *solvit ad diem* he should intend it paid. (6 Mod. 22.) This doctrine was afterwards adopted by Lord Raymond, in the case of *Constable v. Somerset*." (Hil. 1 G. 2. at Guildhall, reported in 1 T. R. 271.) per Buller J. in *Oswald v. Legh*, 1 T. R. 271. See also the opinion of Ld. Chr. Talbot, in 3 P. Wms. 396, 397.

(33) In *R. v. Stephens*, 1 Burr. 434. Ld. Mansfield C. J. observed, that there was not any direct and express limitation of time, when a bond should be presumed to have been satisfied: the general time, indeed, was commonly taken to be about twenty years; but he had known Ld. Raymond leave it to a jury upon eighteen years. So in *Hull v. Horner*, Cowp. 109. Ld. Mansfield said, that there was not any statute of limitations which would bar an action upon a bond, but that there was a time when a jury might presume the debt to have been discharged: as where interest did not appear to have been paid for sixteen years. But, if a witness is produced to prove the contrary, as by shewing the party not to have been in solvent circumstances, or a recent acknowledgment of the debt, the jury must say the contrary. A similar doctrine was laid down by Lord Mansfield in *Oswald v. Legh*, 1 T. R. 272. where he said, "that there was a distinction between length of time as a bar, and where it was only evidence of it; the former was positive, the latter only presumption: and he believed that in the case of a bond, no positive time had been expressly laid down by the court, that it might be eighteen or nineteen years." Although these observations of Lord Mansfield stand unqualified, and may appear to establish this point, viz. that a less period of time than twenty years is of itself sufficient to raise a presumption of payment; yet, since the case of *Oswald v. Legh*, in the decision of which Lord Mansfield concurred, such doctrine cannot fairly be inferred from them. It should seem, therefore, that the positions of his lordship must be taken with the qualification mentioned in the text, and that where the time falls short of twenty years, other evidence will be required to raise a presumption of payment.

the presumption that the bond has been satisfiedⁱ; such as having settled an account in the intermediate time, without any notice having been taken of such a demand, &c. Where the time elapsed is considerable, though short of 20 years, the slightest evidence will be sufficient; but it is essentially necessary that some evidence of this kind should be given: for where to debt on bond^k defendant pleaded payment, and it did not appear that there had been any demand made on the bond for nineteen years and a half, this circumstance alone was holden to be insufficient to raise the presumption of payment.

A receipt for interest, within twenty years, endorsed on a bond by the obligee, (although the time when such receipt was written and signed did not appear, otherwise than by the endorsement,) may be given in evidence to rebut the presumption.

In an action of debt brought in Hil. Term, 1725^l, on a bond dated in June, 1697, with a condition for the payment of a sum of money on the 25th of December following; the defendant pleaded payment of principal and interest, before action brought, viz. on the 10th February, 1709, according to the statute 4 Ann. c. 16. s. 12.: issue was joined on this plea; at the trial the defendant insisted on the length of time, as presumptive evidence that the money had been paid; to answer which the plaintiff produced the bond, with two endorsements upon it, in the obligee's hand-writing, of receipts for interest, one dated in 1699, and the other in 1707. Pratt C. J. seemed to be of opinion, that these being only entries under the obligee's hand, who had the bond in his custody, and might enter upon it what he pleased, could not be evidence for him, and therefore rejected the evidence; whereupon the plaintiff was non-suited. A new action having been brought, Raymond C. J. admitted the endorsements to be read, and the jury found for the plaintiff; upon which a bill of exceptions was tendered, and afterwards judgment was given for the plaintiff^m; and, on error brought, affirmed in the house of lordsⁿ (34).

i Golsell v. Budd, 1 Camp. N, P. C. 27. l Serle v. Lord Barrington, Lord
Lord Ellenborough C. J. Raym. 1370.
k Oswald v. Legh, 1 T. R. 270. m Str. 827.
n 8 Feb. 1730. 3 Bro. P. C. 535.

(34) It must be observed, that in this case there had not been a lapse of twenty years from the day of payment mentioned in the condition to the date of the endorsement. In Turner v. Crisp, Str. 827. Raymond C. J. refused to let the endorsement of a receipt of

7. Release.

To debt upon bond, the defendant may plead a release, by the plaintiff, after the bond given (35).

If there are two or more obligees^a, a release by one will be a bar to all:

In debt on bond, by several plaintiffs, as trustees^b, &c. the defendant pleaded a release from one of the plaintiffs. On demurrer, the plea was holden good; for the obligees only had the legal interest, and consequently the right to release; and a release from the one was a release from the others.

If there are two or more obligors, a release to one may be pleaded in bar by the other, whether the bond be joint^c, or joint and several^d, for there is but one duty extending to all the obligors, and therefore a discharge of one is a discharge of all. It is immaterial whether the release be by deed, or by operation of law^e (36); for where the obligee in a joint and several bond, made one of two obligors his executor, who administered and died, it was holden^f, that the surviving obligor was discharged; for a personal action once suspended by the voluntary act of the party entitled to it, is for ever gone and discharged. So where the obligee in a

^a 2 Rol. Abr. 410. l. 47.

^b Bayley v. Loyd, M. T. 12 G. 2. C.

B. 7 Mod. 250. Leach's edit.

^c 2 Rol. Abr. 412. (G.) pl. 4.

^d Ib. pl. 5. 1 Inst. 232 a.

^e Cheetham v. Ward, 1 Bos. & Pul. 630.

^f Dorchester v. Webb, 3d Resolution. Sir W. Jones, 345.

part of the bond, after the presumption had taken place, to be given in evidence, saying, that this case differed from that of Serle v. Barrington, where the endorsement appeared to be made before it could be thought necessary to be made use of to encounter the presumption. See 2 Vez. 43. S. P. per Ld. Hardwicke Chr. See farther on this subject, Rose v. Bryant, 2 Camp. N. P. C. 321.

(35) It seems that if the release has been obtained fraudulently, the special circumstances under which it was given, and that it was obtained by fraud, may be replied. See a replication of this kind in Craib v. D'Aeth, 7 T. R. 670. n. (b.) It is worthy of remark, that in Legh v. Legh, 1 Bos. and Pul. 447. where the obligor, after notice of the bond, having been assigned, took a release from the obligee, and pleaded it to an action brought by the assignee in the name of the obligee, the court (exercising, as it should seem, an equitable jurisdiction) set aside the plea on a summary application.

(36) But a release by will is not sufficient. Parsons v. Coward, B. R. H. 10 G. 2. Ca. Temp. Hardw. 357.

joint and several bond made one of two obligors his executor, *with others*^u, and the obligor executor administered; it was holden, that the action was discharged as to all the obligors. But if A. and B. are jointly and severally bound in an obligation to C., and A. makes C. and D. his executors; C. refuses, and D. administers, and afterwards C. makes D. his executor; D., as executor of C., may maintain an action on the bond against B.^x; for when the obligor makes the obligee and another executors, and the obligee refuses, the debt is not released or discharged, and the obligee or his executor may sue for the debt (37).

If feme obligee take the obligor to husband, this is a release in law^y. So if there be two femes obligees, and the one takes the debtor to husband^z. The like law is, if two be bound in an obligation to a feme sole, and she takes one of them to husband, and the husband dies, the wife shall not have an action against the other obligor^a. But where a man, on the day of his marriage, gave a bond to the woman, to whom he was to be married, by which he stipulated, that his representatives should, within twelve months after his death, pay to his widow, or her representatives^b, a sum of money; and the marriage took place, and afterwards the husband died; whereupon the widow brought an action against the representatives of the husband, on the bond; it was holden, that the marriage did not operate as a release of the debt, the bond not being payable during the life-time of the obligor, nor until twelve months after his death.

A covenant not to sue will not operate as a release^c, in its own nature, but only by construction, to avoid circuity of action. Hence, if the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do, that the deed of covenant may be pleaded in bar, he may still sue the other obligor (38).

^u Cheetham v. Ward, 1 Bos. & Pul. 600. ^z 1 Inst. 264 b.

^x Dorchester v. Webb, W. Jones, 345.

^y 1 Inst. 264 b.

^a 21 H. 7. 30.

^b Milbourn v. Ewart, 5 T. R. 381.

^c Dean v. Newhall, 8 T. R. 168.

(37) But otherwise, if the obligee administers. Per Cur. S. C. If a debtor make his creditor and another person executors, and the creditor neither proves the will nor acts as executor, he may maintain an action against the other for his demand on the testator. Rawlinson v. Shaw, 3 T. R. 557.

(38) See Fitzgerald v. Trant, 11 Mod. 254. and Lacy v. Kynaston, Holt's Rep. 178. 1 Ld. Raym. 690. and 12 Mod. 551.

Even in those cases where a covenant not to sue shall be construed to enure as a release to avoid circuitry of action, the covenant not to sue must be a perpetual covenant, that is, a covenant not to sue at all; for a mere covenant not to sue within a particular time^d will not have this effect. In such case the party cannot plead the covenant in bar, but is put to his action of covenant. But if the obligee covenant not to sue the obligor before such a day^e, and *if he do, that the obligor shall plead this as an acquittance*, and that the obligation shall be void, this is a suspension of the obligation, and so by consequence a release.

A bond was conditioned^f, that the obligor should indemnify the obligee from all sums the latter should pay on the account of the obligor; before the execution of the bond, the following memorandum was endorsed on it, viz. "that the obligee *hath* given an undertaking not to sue upon the bond until after the obligor's death;" it was holden, that the memorandum was to be taken as part of the condition, and consequently that the bond was payable only by the representative of the obligor after his death.

3. Set-off.

At the common law, if the plaintiff was indebted to the defendant in as much or even more than the defendant owed to him, yet the defendant had not any method of setting off such debt in the action brought by the plaintiff for the recovery of his debt. To obviate this inconvenience, and to prevent circuitry of action, or a bill in equity, it was enacted, by stat. 2 G. 2, c. 22. s. 13. (made perpetual by the 8 Geo. 2. c. 24.

^d *Deux v. Jefferyes*, Cro. Eliz. 352. 1 e 1 Rol. Abr. 939. L. pl. 2.
 Rol. Abr. 939. S. C. *Ayliff v. Scrom-* f *Burgh v. Preston*, 8 T. R. 483.
 shire, 1 Show. 46. Salk. 573. S. C.

where the distinction between a covenant not to sue a sole obligor, and one of several obligors is taken; in the latter report it is said, "A. is bound to B., and B. covenants never to put the bond in suit against A.; if afterwards B. will sue A. on the bond, he may plead the covenant by way of release. But if A. and B. be jointly and severally bound to C. in a sum certain, and C. covenant with A. not to sue him, that shall not be a release but a covenant only; because he covenants only not to sue A., but does not covenant not to sue B.; for the covenant is not a release in its nature, but only by construction to avoid circuitry of action; for where he covenants not to sue one, he still has a remedy; and then it shall be construed as a covenant and no more."

s. 4.) that "where there are mutual debts between the plaintiff and defendant; or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and either party; one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require: so as at the time of pleading the general issue, where any such debt of the plaintiff, his testator, or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence on such general issue."

Upon the construction of this statute several questions arose; First, Whether debt on simple contract could be set off in common cases against a specialty debt (39)? 2ndly, If in common cases, whether they could be so set off, where an executor or administrator is plaintiff (40)? and 3dly, Whe-

(39) This question first arose in *Stephens v. Lofting*, M. 6 G. 2. C. B. 8 Vin. 562. pl. 31. and cited by Willes C. J. in *Hutchinson v. Sturges*, Willes, 262. when the court were of opinion that a simple contract debt could not be pleaded by way of set-off to a bond. But on error in B. R. Yorke C. J. expressed a strong opinion to the contrary; Probyn J. concurred with the C. J.; Price J. doubted, and Lee J. did not give any opinion; the decision, however, of another point (see post, p. 521. n.) rendered the determination of this question unnecessary at that time. The same question was again agitated in *Brown v. Holyoak**, E. 7 G. 2. C. B. The case was this: In debt for rent† upon a lease by indenture, the defendant pleaded that a greater sum was due from the plaintiff to the defendant, upon a promissory note; after argument, judgment was given for the plaintiff, on the ground that his demand was equal to a specialty, and that a simple contract debt could not be set off, against a specialty debt. On error in B. R. the judgment of the court of common pleas was reversed by Lord Hardwicke C. J. and the court, the day after the stat. 8 G. 2. c. 24. was passed.

(40) In *Kemys v. Betson*, C. B. T. 6 Geo. 2. 8 Vin. 561. pl. 30. and cited by Willes C. J. in *Hutchinson v. Sturges*, Willes, 262. it was holden in the case of an executor, that simple contract debts could not be set off against debts on specialties; for the debts must be of an equal nature: otherwise such a construction might occasion a devastavit. And in *Joy v. Roberts*, in the Exchequer, M. 6 Geo. 2. (cited by Willes C. J. in *Hutchinson v. Sturges*, Willes, 262.) there was the same resolution.

* Barnes, 290.

† By an administrator, 8 Vin. 562.

ther, in the case of a bond, the penalty was to be considered as the debt (41)? To remove these difficulties, it was enacted and declared by stat. 8 Geo. 2. c. 24. s. 5. that, "by virtue of the preceding clause, mutual debts might be set against each other, either by being pleaded in bar or given in evidence on the general issue, in the manner therein mentioned, notwithstanding such debts were deemed in law to be of a different nature; unless in cases where either of the said debts should accrue by reason of a penalty contained in any bond or specialty; and in all cases, where either the debt for which the action is brought, or the debt intended to be set against the same, hath accrued, by reason of any such penalty, the debt intended to be set off shall be pleaded in bar; in which plea shall be shewn how much is due on either side (42); and in case the plaintiff shall recover in any such action, judgment shall be entered for no more than shall appear to be due to the plaintiff, after one debt being set against the other as aforesaid."

In debt upon a bail bond, brought by the officer of the palace court^s, to whom the defendant had given the bond conditioned for the appearance of A. B. to answer C. D. in a plea of trespass on the case; the defendant pleaded, by way of set-off, a greater sum due to him from the plaintiff,

^g Hutchinson v. Stargess, Willes, 261.

(41) In debt on a bond for 76*l.* 10*s.* conditioned for the payment of £38, the defendant pleaded a debt by simple contract of £70^{*}. On demurrer the question was, whether the penalty were the legal debt, so that the money due could not be pleaded against what was really due upon the bond. Judgment for the plaintiff in C. B. On error in B. R. Yorke U. J. said, that the penalty of the bond was the legal debt; that one part of the stat. 2 Geo. 2. c. 22. s. 13. was to be compared with the other; and, therefore, if the defendant (as he might have done) had pleaded the general issue, and given in evidence part of the plaintiff's demand, and craved to have an allowance of so much; this would not have aided him, for the jury must find the whole, or else that it was not the parties' deed, and they could not sever the debt; so, in like manner, a lesser sum than was demanded by the plaintiff, that is, than the penalty, could not be pleaded. Judgment of C. B. affirmed.

(42) Hence the defendant in his plea must aver what is really due; and this averment has been holden to be traversable[†], although laid under a videlicet[‡].

^{*} Stephens v. Lofting, B. R. M. 7 G. 2. 2 Barnard. 339.

[†] Symmons v. Knox, 3 T. R. 65.

[‡] Grimwood v. Barrett, 6 T. R. 460.

by simple contract. On demurrer, the court gave judgment for the plaintiff; Willes C. J. (who delivered the opinion of the court) observing, that as this was not a bond conditioned for the payment of money, the case was not within the stat. 8 Geo. 2.; and it was not within the stat. 2 G. 2., because the plaintiff did not sue in his own right but in the nature of a trustee for C. D.; that it might as well be said, that when a person sued as executor, the defendant might set off a debt from the plaintiff to the defendant, in his own right, as that the defendant could set off in the present case. He added, however, that if this had been a bond to the sheriff, assigned over to the party according to the statute, the court would have thought otherwise; and that the penalty must have been considered as the debt, this not being a case within the stat. 8 Geo. 2.

To debt on bond conditioned for the payment of an annuity to plaintiff^a, defendant pleaded, that a certain sum only was due to the plaintiff on account of the annuity, and that the plaintiff was indebted to the defendant in a larger sum of money, for money lent, &c., which he claimed to set off: on demurrer, it was adjudged, that this was a case within the stat. 8 Geo. 2. c. 24. s. 5., and that the defendant was entitled to set off his debt.

The following rules must be attended to in pleading a set-off:—Uncertain damages, or an unliquidated demand, cannot be made the subject of a set-off^l (43). But if two persons agree to perform certain work in a limited time^k, or to pay a stipulated sum weekly, for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the stipulated sum weekly, such weekly payments are in the nature of liquidated damages, and not by way of penalty, and may be set off by the obligee in an action brought against him by the obligor who executed. 2dly, A debt barred by the statute of limitations cannot be set offⁱ; for the remedy, by way of set-off, was intended to supersede

^a Collins v. Collins, 2 Barr. 890.

ⁱ Howlet v. Strickland, 1 Cowp. 56.

Weigall v. Waters, 6 T. R. 488.

^k Fletcher v. Dyche, 2 T. R. 32.

^l Per Willes C. J. in Hutchinson v. Sturges, Willes, 262.

(43) "Debts to be set off must be such as an *indebitatus assumpsit* will lie for." Per Ashhurst J. in Howlet v. Strickland, Cowp. 56.

the necessity of a cross action; and a debt barred by the statute of limitations cannot be recovered by action. If such debt be pleaded, the plaintiff ought to reply the statute^m (44). 3dly, The debts sued for, and intended to be set off, must be *mutual*, and due in the same right (45).

A debt due to a person in right of his wifeⁿ, cannot be set off in an action against him on his own bond.

**IV. Debt on Bail-bond—Stat. 23 H. 6. c. 10.—
Assignment of Bail-bond under Stat. 4 Ann,
c. 16.—Declaration by Assignee—Of the Plead-
ings, *comperuit ad Diem*—*Nul tiel Record*,**

At common law, the sheriff was not obliged to take bail from a defendant arrested upon mesne process, unless he sued out a writ of mainprize; but, by stat. 23 H. 6. c. 10. it was enacted, “that sheriffs, under-sheriffs, bailiffs of “franchises, and other bailiffs (46), should let out of prison “all persons by them arrested or being in their custody, by “force of any writ, bill, or warrant, in any action per- “sonal (47), or by cause of indictment of trespass (48),

^m Remington v. Stevens, Str. 1271.

ⁿ Bull. N. P. 179. cites Paynter v. Walker, C. B. E. 4 Geo. 3.

(44) If such debt be given in evidence, on a notice of set-off, it may be objected to at the trial. Bull. N. P. 180.

(45) See cases affording an illustration of this rule, under plea of set-off, tit. Assumpsit, ante, p. 139.

(46) “This statute does not authorize *sheriffs’* bailiffs to take obligations for the appearance of persons arrested: from the express mention of bailiffs of franchises, it appears that those officers only are meant, who have the return of process. When, therefore, the process is directed to the sheriff, the indemnity must be to him.” Per Buller J. in Rogers v. Reeves, 1 T. R. 422. The marshal of the King’s Bench is an officer within this statute, Bracebridge v. Vaughan, Cro. Eliz. 66.; but the serjeant at arms of the House of Commons is not. Norfolk v. Elliot, 1 Lev. 209.

(47) Upon an attachment of privilege, attachment upon a prohibition, attachment in process upon a penal statute, the sheriff

“ upon reasonable surety (49) of sufficient persons, having
 “ sufficient within the counties where such persons are let
 “ to bail, to keep their days in such place as the said writs,
 “ bills, or warrants, shall require; persons in ward by con-
 “ demnation, execution, *capias utlagatum*, or *excommuni-*
 “ *catum*, surety of the peace, or by special commandment
 “ of any justice excepted. And no sheriff, &c. shall take,
 “ or cause to be taken or made, any obligation for any cause
 “ aforesaid, or by colour of their office, but only *to them-*
 “ *selves*, of any person, nor by any person, which shall be
 “ in their ward by course of law, but upon the name of
 “ their office, and upon condition that the prisoners shall
 “ appear at the day and place contained in the writ, &c.;
 “ and if any sheriffs, &c. take any obligation in other form
 “ by colour of their office, it shall be void.”

The constant usage since the passing this act has been for

may be compelled to take bail by force of this statute; but not upon an attachment for a contempt, issuing out of B. R.* or C. B.† or the Court of Chancery, for disobeying a subpoena‡. In *Studd v. Acton*, it was holden, that the words, “ by force of any writ, bill, or warrant, in any action personal,” were confined to actions at law.

(48) The sheriff is not authorised§ to take a bond for the appearance of persons arrested by him, under process issuing upon an indictment at the quarter sessions, for a trespass and assault; because at common law the sheriff could not bail any persons indicted before justices of the peace||, and this stat. of 23. H. 6, was not passed to enable the sheriff to take bail in cases where he could not bail before; but, in order to compel him to take bail in those cases, where he might have taken bail and neglected so to do. At common law, the sheriff might have bailed persons indicted before him at his torn¶, and, consequently, by this statute, he was compellable to bail such persons; but the stat. 1 Edw. 4. c. 2. having taken away the sheriff's power of bailing in such cases¶, the stat. 23 H. 6. is in this respect rendered of none effect.

(49) According to the opinion of Ashhurst J. in *Rogers v. Reeves*, 1 T. R. 421. a security of a lower nature than a security by bond, as a simple contract undertaking, is insufficient. If the sheriff refuses to take bail, sufficient sureties being tendered, the proper remedy against him is an action of trespass on the case, *Smith v. Hall*, 2 Mod. 32.

* Anon, 1 Str. 479. Resolved by all the judges.

† *Field v. Workhouse*, Comyns's Rep. 264.

‡ *Studd v. Acton*, 1 H. Bl. 469.

§ *Bengough v. Rossiter*, 4 T. R. 505.

|| 2 Hawk. P. C. c. 15. s. 26.

¶ *Id.* s. 27.

sheriffs, and other officers, to take a security *by bond*^o. Regularly, this bond ought to be taken with two or more sureties, at the least, the words of the statute being "surety of sufficient *persons*;" and the sheriff, &c. may insist upon two sureties being given; yet it has been adjudged^p, that, as the indemnity is for the protection of the sheriff, &c. he may wave the benefit, and take a bond with one surety only.

The form of surety prescribed by the statute must be strictly pursued, that is,

1st, The bond must be made to the sheriff or other officer himself^q. Hence a bond made to the sheriff's bailiff is bad.

2dly, It must be made to the sheriff or other officer by the name of his office^r and county. On error in debt on bail-bond, if was excepted, that it was not shewn, that the bond was to the sheriff by the name of his office. The court were of opinion that it should so appear^s; but they thought, that in the present case it did sufficiently appear on the whole declaration, it being laid *solvend. eidem vicecomiti et assignatis*.

3dly, There must be a condition to the bond; and that condition must be for the appearance of the defendant at the day and place mentioned in the writ, &c.; and for that only. Hence, if there be not any condition^t; or, what amounts to the same thing, if the condition be impossible, as where the condition is for the appearance of the defendant at a day past when the bond is made^u, the bond is void. So if any other condition than that prescribed by the statute is expressed in the bond: as if it be conditioned "to put in good bail for the defendant at the return of the writ, or to surrender the defendant, or to pay the debt and costs^x," it will be bad. But if the bond be made to the sheriff by the name of his office, and the condition expresses the time and place of appearance, a variance in other respects will be immaterial. As in the following cases; where the writ was to answer A. B. in a plea of debt of *three hundred and twenty pounds*, and the condition of the bond was to appear to answer A. B. in a plea of debt^y. Where the writ was to answer *in a plea of trespass*, and the condition was to appear

^o See note (49).

^p Drury's case, 10 Rep. 100. b. 101. a. recognized in Cotton v. Wale, Cro. Eliz. 862.

^q 1 T. R. 422.

^r Noel v. Cooper, Palm. 278.

^s Symes v. Oakes, Str. 893.

^t Graham v. Crawshaw, 3 Lev. 74.

^u Samuel v. Evans, 2 T. R. 569.

^x Rogers v. Reeves, 1 T. R. 418.

^y Villiers v. Hastings, Cro. Jac. 286.

to answer generally, without saying in what action; the court held the bond good; because no other action shall be intended; and the statute only requires the bond to be conditioned for an appearance, and the words "to answer, &c." are surplusage^a. Where the writ was to appear before our lord the King, at Westminster, and the condition was to appear before his Majesty's justices of the bench, at Westminster^b; it was holden sufficient (50). Where the writ was to answer in a plea of trespass, and also to a bill of 100*l.* of debt, and the condition was to answer in a plea of trespass of 100*l.*; the variance was holden to be immaterial^b. Where the original writ was to answer in a plea of trespass *on the case on promises*; and the condition was to answer in a plea of trespass; the bond was holden to be good^c. Where the writ was to answer of a plea of trespass, and also to a bill of *the said John*; and the condition was to answer of a plea of trespass, and also to a bill (omitting the words "of the said John,") it was holden an immaterial variance^d. Where the process was to appear before the barons; and the condition was to appear in the office of pleas in the Court of Exchequer, at Westminster; it was holden well enough^e. Where the process was in an action of trover; and the condition was to appear to answer of a plea of trespass on the case on promises; the bond was adjudged sufficient, on the ground that the words, "to answer, &c." were only surplusage, and might be rejected^f. Where the original was returnable before our lord the king, wheresoever, &c.; and the words, "wheresoever, &c." were omitted in the bail-bond; and it was objected^g, that, by the statute, the sheriff could not take any bond but such as corresponded with the writ, whereas this might be to compel an appearance out of England, if the king should happen to be so; but the court said, that it was sufficient in these bonds to state in substance the design of the writ; and they would understand, that by appear-

^a Kirkbridge v. Wilson, 2 Lev. 123.

^b Kirkbride v. Curwen, 2 Lev. 180. T. Jones, 46.

^b Cudwell v. Dunkin, T. Jones, 137. 2 Show. 51. S. C.

^c Owen v. Nail, 6 T. R. 702.

^d Reach v. Bretton, 10 Mod. 327.

^e Philips v. Philips, cited 2 Str. 1156.

^f Davenport v. Parker, Fort. 368.

^g Shuttleworth v. Pilkington, 2 Str. 1155. 7 Mod. 325. Leach's Ed. cited by Buller J. in King v. Pippett, 1 T. R. 240.

(50) It appears from Levinz's report of this case, that the defendant brought a writ of error in the Exchequer Chamber, and that it was argued again, and the majority of the judges were for affirming the judgment. But North C. J. being strongly against it, it was adjourned.

ing before the king, was meant before the king *in his court*, and not before the king *in person*. So where the writ was to appear, on a general return day, before the king, *where-soever he should then be in England*^b, and the bond was conditioned for the appearance of the party before the king, at *Westminster*, at the day named in the writ; the variance was holden to be immaterial; Ld. Ellenborough C. J. observing, that Westminster, according to the common understanding of every body at this day, (considering that the Court of King's Bench had been invariably held there for many centuries, except only when it was removed for a short period to Oxford, in 1655) was the place meant by the more general description in the writ; and that the variance in this case was certainly not greater than that in the preceding case of *Shuttleworth v. Pilkington*.

An executor brought debt in the *debet and detinet*ⁱ upon an assignment of a bail-bond, for appearance to a bill of Middlesex, and to answer the plaintiff of a plea of trespass, *ac etiam hille querentis ut executoris l. S. pro 1500l. de debito secundum consuetudinem curie nostre coram nobis exhibend*. On demurrer, it was contended, that this action ought to have pursued the original action, and to have been brought in the *detinet* only. But the court gave judgment for the plaintiff, Parker C. J. observing, "The condition of the bond is to appear; in the first place, to answer the plaintiff in an action of trespass in his own right, and then, *secundum consuetud. cur.* to answer the bill in debt as executor, for this court has not jurisdiction in debt originally; but in whatever county the court is sitting you may have a bill in trespass; and, when the party is brought in, a bill may be exhibited against him in any other action; for, being in custody of the marshal of the supreme court, he shall answer to all matters there; so that this bond is also a security for his appearance in the action of trespass, which is in the plaintiff's own right, and may be insisted on as well as the bill in debt, *ergo*, the action well brought in the *debet and detinet*. This action is *in loco* of the sheriff.

If the sheriff does not comply with the *injunctions* of the statute, and, without the plaintiff's consent, takes a security of a different kind than that described therein; the courts will not afford him any relief, nor interpose in his favour, for the purpose of enforcing such security, on the ground of his having been guilty of a breach of his duty.

^b *Jones v. Stordy*, 9 East, 55.

ⁱ *Brumfield v. Lander*, B. R. H. 12 Ann. MS.

Hence, where a *sheriff's officer*^k took an undertaking from the defendant's attorney, instead of a bail-bond, for the appearance of the defendant, and bail above was not duly put in, and an action for an escape was brought against the sheriff, the court would not relieve him, by permitting him to put in and justify bail afterwards; although he offered to pay the costs of the action brought against him. So where the defendant's attorney gave the sheriff's officer an undertaking^l, that he would give the sheriff a bail-bond in due time, which he afterwards neglected to do, and the plaintiff recovered against the sheriff for the escape; the court refused to proceed summarily against the attorney, to make him pay the debt and costs, for his breach of faith, on the ground that the undertaking was illegal (51).

The statute 23 H. 6. c. 10. is a general law^m, of which the king's courts will take cognizance, although it is not pleaded (52).

As to the manner of pleading, so as to take advantage of this statute, it will be proper to remark, that the special matter, which brings the case within the statute, must appear by some means or other upon the record: if it be shewn on the declaration, it need not be pleadedⁿ. So if it appear on craving oyer of the bond, the defendant may demur

^k Fuller v. Prest, 7 T. R. 109.

^m Samuel v. Evans, 2 T. R. 569.

^l Sedgworth v. Spicer, 4 East, 568.

ⁿ Id.

(51) It is to be observed, that the provisions of this statute are confined to securities given to *the sheriff* or other officer. Hence bonds given to the plaintiff are not within the statute^{*}; and consequently may be taken in a different form than that prescribed by the statute[†]. So, also, undertakings given by the defendant or his attorney, to *the plaintiff or his attorney*, for the appearance of the defendant, are valid, and may be enforced by attachment.

(52) This statute was formerly considered as a private law. But in Samuel v. Evans, which finally decided that it was a public law, it was observed, that whatever might have been the law before the statute of Queen Ann, the case of Saxby v. Kirkus[‡], had removed all doubt: for the court there said, though the 23 H. 6. c. 10. were a private law, yet the statute 4 & 5 Ann. having enabled the sheriff to assign such bond, the court must take notice of the law that enables him to take such bond. See Benson v. Welby, 2 Saund. 155. a. n. (4) where all the learning on this subject is collected by Serjeant Williams.

^{*} Raven v. Stockdale, Gouldsb. 56. agreed in Leech v. Davys, Aleyn, 58.

[†] Hall v. Carter, 2 Mod. 304. per Buller J. Rogers v. Reeves, 1 T. R. 482.

[‡] Bull. N. P. 224.

without shewing the special matter^o. In short, it is sufficient if it appears on any part of the record.

If the defendant does not appear at the return of the process, according to the condition of the bail-bond, that is, if he does not put in and perfect bail above in due time^p, the bail-bond is forfeited, and the plaintiff may take an assignment of it. This course is usually pursued, if the bail below are sufficient. Before the statute for the amendment of the law, 4 & 5 Ann, c. 16. the sheriff was not compellable to assign the bail-bond, though if he had not assigned it, the court would have amerced him. Another mischief at common law was, that after an assignment of the bail-bond, the action thereupon must have been brought in the name of the sheriff, who might have released the obligor^q, and thereby driven the plaintiff into a court of equity. To remedy these inconveniences, it was enacted, by stat. 4 & 5 Ann. c. 16. s. 20. " that if any person shall be arrested by
" any writ, bill, or process, issuing out of any of the king's
" courts of record at Westminster, at the suit of any com-
" mon person, and the sheriff, or other officer, takes bail
" from such person, the sheriff (53), or other officer, at the
" request and costs of the plaintiff in such action or suit,
" or his lawful attorney, *shall* (54) assign to the plaintiff in

^o Per Buller J. in *Samuel v. Evans*, 2 T. R. 575. ^p *Harrison v. Davies*, 5 Burr. 2683.
^q *Shipley v. Craister*, 2 Ventr. 131.

(53) In the case of *Kitson v. Fagg*, 1 Str. 60. (for the argument in this case see 10 Mod. 288.) the question being, whether a bail-bond was well assigned by an under-sheriff's clerk? Parker C. J. said, that he had the advice of all his brethren; and they were of opinion, that an under-sheriff might assign a bail-bond in the name of the high-sheriff, it having been the constant practice ever since the stat. 4 & 5. Ann., but that if the assignment was neither by the sheriff, nor his under-sheriff, as in this case, it would not be good.

In debt on a bail-bond, defendant pleaded that there was not any assignment of the bond by sheriff or under-sheriff. It appeared in evidence, that the bond had been assigned to the plaintiff by one of the under-sheriff's clerks. The preceding case of *Kitson v. Fagg* was cited as an authority to shew, that this was not a good assignment. But Ld. Mansfield C. J. was clearly of opinion, that the seal to the assignment, being the seal of office, was sufficient to give it validity, whoever had signed it. *Harris v. Ashby*; London Sitings, M. T. 1756. MSS.

(54) If the sheriff refuses to assign the bail-bond, it seems that an action on the case will lie against him for breach of duty imposed by the statute.

“ such action the bail-bond, or other security taken from
 “ such bail, by endorsing the same, and attesting it under
 “ his hand and seal, in the presence of two or more credi-
 “ ble witnesses, which may be done without any stamp,
 “ provided the assignment so endorsed be duly stamped be-
 “ fore any action brought thereupon; and if the bail-bond
 “ or assignment, or other security taken for bail, be for-
 “ feited, the plaintiff, in such action, after such assignment
 “ made, may bring an action thereupon *in his own name*;
 “ and the court, *where the action is brought*, may, by rule
 “ of the same court, give such relief to the plaintiff and de-
 “ fendant in the original action, and to the bail, as is agree-
 “ able to justice, and such rule shall have the effect of a de-
 “ feasance to the bail-bond.” By s. 24. it is provided, “ that
 “ this act shall extend to all courts of record within this
 “ kingdom.”

Although, by this statute, the court where the action is brought, on the bail-bond, is expressly authorised to exercise an equitable jurisdiction, yet, upon the supposition that every other court, except that where the original action was brought, is incompetent to exercise this jurisdiction, it has been holden, that an action on the bail-bond, whether brought by the assignee^r or the officer^s, must be brought in that court, where the original action was commenced; but advantage cannot be taken of the action having been brought in a wrong court, upon the plea of *non est factum*^t.

The assignment may be stated in the declaration to have been made in a different county from that in which the bail-bond was given, and the venue may be laid in the county in which the assignment is stated to have been made, agreeably to the rule, that where matter in one county is dependent on matter in another county, the plaintiff may lay his action in either.

Debt upon a bail-bond; and plt. declares that he sued out a writ directed to the sheriff of Surrey^u, &c. who took a bail-bond, which he afterwards assigned to the plaintiff at London, where the action was brought. Demurrer, on the ground that the action was founded on the bond entered into by the bail, and that being laid to be done in Surrey, the

^r *Chesterton v. Middlehurst*, 1 Burr. 642. *Walton v. Bent*, 3 Burr. 1923.
^s *Morris v. Rees*, 2 Bl. Rep. 838. and 3 Wils. 348.
^t *Wright v. Wahmsley*, 2 Camp. N. P. C. 396.
^u *Gregson v. Heather*, Str. 727. and Ld. Raym. 1455. *Norcroft v. Matthews*, 13 G. 1. S. P. on the authority of *Gregson v. Heather*.
^a *Donatty v. Barclay*, 8 T. R. 152. but see *Newman v. Fancitt*, 1 H. Bl. 631. contra, as to sheriff, that he may sue in a different court.

action should have been there; but judgment for the plaintiff.

It is sufficient for the plaintiff to state in his declaration^x, that the sheriff assigned the bond to him *according to the form of the statute*, without adding, "that the assignment was under the hand and seal of the sheriff;" and the defendant may plead, that he *did not assign, &c. according to the form of the statute*, and the plaintiff may tender an issue thereon in those words, on which he must prove that the assignment was according to the statute, under the hand and seal of the sheriff.

So, though the statute requires the endorsement to be made by the sheriff in the presence of two witnesses, yet it does not require the names of the witnesses to be set forth in the declaration, and, consequently, if they are omitted, the omission will be holden immaterial^y. So if it is averred in the declaration, that the sheriff assigned the bail-bond by endorsement upon the said writing obligatory and attesting it under his hand and seal, in the presence of two credible witnesses^z; or if it be averred, that the assignment was made in the presence of two credible witnesses^a, it is sufficient without averring that the endorsement was attested by two credible witnesses.

A *profert in curia* of the assignment is not necessary; because the assignment is not by deed^b.

It is not necessary to state in the declaration, that the defendant in the original action was arrested^c, nor, if stated is it traversable^d. Neither is it necessary to state, that the debt was sworn to by the plaintiff, nor that the sum sworn to was endorsed on the writ, such omission having been sanctioned by a series of precedents^e.

Bail to the sheriff are liable to the plaintiff's whole debt (without regard to the sum sworn to) and costs, to the extent of the penalty of the bail-bond^f.

x Dawson v. Papworth, Willes's Rep. 408.

y Robinson v. Taylor, Fort. 366.

z Leafé v. Box, 1 Wils. 121.

a Rollison v. Taylor, 13 G. 1. (probably the S. C. with Robinson v. Taylor, Fort. 366. though this point is not mentioned in that report) cited

by Wright J. in Leafé v. Box, 1 Wils. 123.

b Leafé v. Box, 1 Wils. 121.

c Watkins v. Parry, Str. 444.

d Haley v. Fitzgerald, Str. 643.

e Whiskard v. Wilder, 1 Burr. 330 (55).

f Stevenson v. Cameron, 8 T. R. 98.

(55) See the remarks of Sir J. Mansfield on this case in Hill v. Heale, 2 Bos. & Pal. N. R. 201.

After a defendant has been discharged out of custody upon the bail-bond being given^g, it is neither in the power of the bail to render him, or of the party to surrender himself again into the custody of the sheriff before the return of the writ without the consent of the latter. But the sheriff may, if he pleases, accept the surrender of the party, who is willing to return into his custody, before the return of the writ. And, if the sheriff consents to do so, and by virtue of such surrender has the defendant in his custody at the return of the writ (56), the court will then consider it as if no bail-bond had been given; and consequently, under these circumstances, an action cannot be maintained against the sheriff for not assigning the bail-bond^h; nor can he be proceeded against for not bringing in the body, although upon being ruled to return the writ, he returned *cepi corpus*ⁱ.

Pleadings.—To an action of debt by the assignees of the sheriff upon a bail-bond, *nil debet* cannot be pleaded^k, but *non est factum* may. If issue be joined on *non est factum*, the only proof required on the part of the plaintiff (supposing there is not any other plea) is proof of the execution of the bail-bond by the defendant^l; for the plea of *non est factum* does not put in issue any other allegation in the declaration; consequently, in such case, it is not necessary to prove the writ, assignment by the sheriff, &c. If by mistake *nil debet* be pleaded, instead of *non est factum*, the plaintiff ought to demur to it^m; for if issue be joined on the plea of *nil debet*, the defendant will thereby be let into any defence that he can prove.

Debt on a bail-bond given upon an arrest in an inferior courtⁿ; the defendant pleads, that before the day of appearance mentioned in the condition, he was rendered to the gaoler there, and there continued till a supersedeas came: upon demurrer the plea was holden good.

^g Hamilton v. Wilson, 1 East, 383.

^h Stamper v. Milbourne, 7 T. R. 122.

ⁱ Jones v. Lander, 6 T. R. 753.

^k Smith v. Whitehead, recognised in Warren v. Consett, Lord Raym. 1503.

^l Hutchison v. Kearns, C. B. London Sittings, Trin. T. 50 G. 3. Sir J. Mansfield C. J. MS.

^m Rawlins v. Danvers, 5 Esp. N. P. C. 38.

ⁿ Pawling v. Ludlow, 2 Show. 442. 3 Mod. 87. S. C.

(56) The party will not be considered as legally in the custody of the sheriff from the mere circumstance of the sheriff's having received notice of the surrender; *there must be an assent on the part of the sheriff to the surrender.* 1 East's R. 383.

Comperuit ad Diem.—In debt on bail-bond, the defendant having craved oyer of the condition, may plead (57) an appearance at the day therein mentioned, according to the form and effect of the condition, concluding with “and this he is ready to certify by the record of the appearance,” for the appearance being entered of record is not triable by jury, but by the record^o. This plea is termed a plea of *comperuit ad diem*. If the appearance is not entered of record, the bond is forfeited^p.

To the plea of *comperuit ad diem* the plaintiff may reply *nul tiel record*, viz. that there is not any such record of the appearance (58). When the record is of the *same* court^q, this replication ought to conclude with giving a day to the defendant. This constitutes a complete issue of fact; and if in this case the defendant should demur to the replication, the plaintiff need not join in demurrer; but if the record is not produced at the day, the plaintiff may sign judgment^r.

When the record is of *another* court^s, the replication ought to conclude with a verification, and a prayer of judgment (59); the defendant thereupon rejoins, “there is such a record;” and the court gives him a day to bring it in.

If the record is not brought into court on the day, judgment of failure of record is given (60).

To an action of debt on a bail-bond to the plaintiffs^t, as sheriff of Middlesex, the defendant pleaded, that the action was brought by the plaintiffs, for the benefit of, and as trustee for, J. S. (the sheriff's officer) by whom the defendant had been arrested, and to whom the defendant, after the return of the writ, but before the sheriff had been ruled to

^o Bret v. Sheppard, 1 Leon. 90.

^p Corbet v. Cook, Cro. Eliz. (466).

^q Cremer v. Wicket, Ld. Raym. 550. and Carth. 517.

^r Tipping v. Johnson, 2 Bos. and Pul. 303.

^s Sandford v. Rogers, 2 Wils. 113. 2 T. R. 443. S. C. cited by Buller J. from a MS. note.

^t Scholey and Demville v. Mearns, 7 East, 148.

(57) See the form of this plea of an appearance in B. R. Tebutt ats. Powle, Lill. Entr. 498. and a similar precedent p. 114. For the form of plea of an appearance in C. B. see the same book, p. 479.

(58) For forms of this replication, see Lilly's Entries, p. 114. 490. 498.

(59) See the form, 1 Saund. 92.

(60) See the form, 1 Saund. 92. n. (3).

return the same, paid the debt and costs, which J. S. accepted in full satisfaction of the bond; and that if any damage had accrued for default of the defendant's appearance, according to the condition of the bond, it was occasioned by the default of the sheriff's officer not paying over the debt and costs to the plaintiff in the action, which would have been accepted by such plaintiff. On special demurrer, the case of *Bottomley v. Brook*^u was cited in support of the plea, to shew that to debt on bond the defendant might plead, that it was given to the plaintiff in trust for another; so as to let the defendant into a defence which he might have against the *cestui que trust*. The court, however, were of opinion that the plea was bad; Lord Ellenborough C. J. observing, that, as the officer could not have released the bond, he could not accept any thing in satisfaction of it; and further, that it was not alleged that the bond was originally given to the sheriff in trust for the officer; nor did it appear, how he afterwards came to have any equitable interest in it; consequently this was not brought within the case cited. Lawrence J. adopting the remark of Buller J. in *Donnelly v. Dunn* (61), animadverted on the plea, as being an attempt to set up matter as a legal defence, which was nothing more than an equitable practice of the court in exercising a summary jurisdiction over its officers.

V. Debt on Bond, with Condition to perform Covenants—Assigning Breaches under Stat. 8 & 9 W. 3. c. 11. s. 8.

At common law, it was usual for the obligee of a bond, with a penalty conditioned for the performance of covenants, to declare on the bond merely; to which the defendant, having craved oyer of the condition and the deed containing the covenants, usually pleaded performance; to this the plaintiff replied a breach of one of the covenants; and upon

^u M. 22 G. 3. C. B. cited in *Winch v. Keeley*, 1 T. R. 621.

(61) 2 Bos. & Pul. 47. where it was decided, that bail could not plead the bankruptcy and certificate of their principal in their own discharge,

issue joined, and proof of such breach, the plaintiff was entitled not only to recover the penalty, that being the legal debt, but also to take out execution for the same; although the penalty far exceeded, in amount, the damages which he had sustained by the breach of covenant. Under these circumstances, the defendant could only obtain relief through the interposition of a court of equity, which would direct an issue of *quantum damnificatus*, and prevent any execution being enforced for more than the damage actually sustained. To prevent plaintiffs, in cases of this kind, from converting that power, which the strictness of the common law gave them, into an engine of oppression, and to avoid the circuitous mode of relief to which defendants were compelled to resort, it was enacted by stat. 8 & 9 W. 3. c. 11. s. 8. "That in actions upon bond, or any penal sum, for
 " non-performance of any covenants or agreements con-
 " tained in any indenture, deed, or writing (62), the plain-
 " tiff may (63) assign as many breaches as he shall think fit,

(62) This statute is not confined to cases where the bond is conditioned for performance of covenants in some other instrument than the bond; *the condition of the bond is an agreement in writing* within this statute. 2 Burr. 826. Neither is this statute confined to cases where there is a penalty to secure the performance of an act, on the non-performance of which the obligee would be entitled to recover uncertain damages; but it extends also to cases where the agreement is for the payment of a certain sum; as to bonds conditioned for the payment of an annuity*, or the payment of a debt by yearly instalments†. So it extends to bonds conditioned for the performance of an award‡, although it appears that only a single sum is to be paid on the bond; for the condition being to perform an award, in other words to perform an agreement, comes directly within the words of the statute. It is to be observed, however, that it has not been holden, that the provisions of this statute extend to common money bonds, that is, bonds with a penalty conditioned for the payment of a less sum of money, at a day or place certain. It seems, that in cases of this kind, defendants are sufficiently protected against an unconscientious demand of the whole penalty by stat. 4 Ann. c. 16. s. 13. by which it is enacted, "that if, at any time pending an action upon any such
 " bond, the defendant shall bring into court the principal, interest,
 " and costs of suit, the same shall be taken in discharge of the bond,
 " and the court shall give judgment accordingly."

(63) This statute having been made for the protection and relief of the defendants, these words, "may assign," have been cou-

* Collins v. Colline, 2 Burr. 820. Walcot v. Goulding, 8 T. R. 126. S. P.

† Willoughby v. Swinton, 6 East, 550.

‡ Welch v. Ireland, 6 East, 613.

“ and the jury, upon trial of such action, shall assess not
 “ only such damages and costs, as have been heretofore
 “ usually done in such cases, but also damages for such
 “ of the assigned breaches as the plaintiff shall prove to
 “ have been broken; and like judgment shall be entered on
 “ such verdict, as heretofore hath been usually done in such
 “ like actions.”

If judgment shall be given for the plaintiff, on demurrer, or by confession, or *nihil dicit* (64), then the statute directs,

strued to be compulsory on the plaintiff, *Drage v. Brand*, 2 Wils. 377. *Hardy v. Bern*, 5 T. R. 540. as have the words, “ may suggest,” in the subsequent part of the statute, where the defendant suffers judgment by default, *Roles v. Rosewell*, 5 T. R. 538. or plaintiff obtains judgment on demurrer, *Walcot v. Goulding*, 8 T. R. 126. Since these determinations, some of the most eminent pleaders have thought it more convenient in cases to which this statute applies, to set forth the condition of the bond, and to assign the breaches in the declaration, than in any subsequent stage of the proceedings. This practice, as it seems, was founded on the supposition, that if the breaches were not assigned in the declaration, and the defendant pleaded *non est factum*, the plaintiff would be precluded from making the suggestion required by the statute; but, in a late case of *Ethersey v. Jackson*, 8 T. R. 255. it was holden, that after issue joined on *non est factum*, the plaintiff might, upon summons, and a judge's order, amend the issue, and proceed according to the directions of the statute; for per cur. it is manifest that the legislature contemplated cases where the plaintiff had not originally assigned breaches in the declaration, which the statute enabled him to supply by entering a suggestion on the record, even after judgment, and therefore *a fortiori* it might be done before. See further on this subject, the notes of Serjeant Williams, in his edition of Saunders, vol. 1. p. 58. n. (1). and vol. 2. p. 187. n. (2).

(64) The only difficulty, in cases where a party obtains a judgment on demurrer or by default, and is obliged to proceed under this statute, respects the costs of the inquisition, which if the plaintiff does not obtain, he is in a worse condition than he would have been before the statute. To obviate this difficulty, Mr. Serjeant Williams, in a note to *Gainsford v. Griffith*, 1 Saund. 58. recommends, that the judgment should be suspended until after the return of the inquisition, and proposes a form of entry for that purpose; to which form, Lord Alvanley, in *Hankin v. Broomhead*, 3 Bos. & Pul. 612. said, that he did not see any objection. His lordship, however, suggested another mode of proceeding, that is, that an application should be made to the court, to order the master to tax the costs of the inquisition, and then to add them to the sum to be levied under the execution.

In debt on bond in the penal sum of £2000, conditioned for the

“ That the plaintiff upon the roll *may* (65) suggest as many
 “ breaches of the covenants and agreements as he shall
 “ think fit, upon which shall issue a writ (66) to the sheriff
 “ of that county where the action shall be brought, to
 “ summon a jury to appear before the justice or justices of
 “ assize, or *nisi prius*, of that county, to inquire of the truth
 “ of every one of those breaches, and to assess the damages
 “ that the plaintiff shall have sustained thereby; in which
 “ writ it shall be commanded to the said justices, that they
 “ shall make a return (67) thereof to the court, whence the
 “ same shall issue, at the time in such writ mentioned;
 “ and in case the defendant, after such judgment entered,
 “ and before any execution executed, shall pay unto the
 “ court, to the use of the plaintiff, his executors or admi-
 “ nistrators, such damages so to be assessed, by reason of
 “ all or any of the breaches of such covenants, together with
 “ costs of suit, a stay of execution of the said judgment
 “ shall be entered upon record; or if, by reason of any exe-
 “ cution executed, the plaintiff, or his personal representa-
 “ tive, shall be fully paid or satisfied all such damages, with
 “ costs of suit, and all reasonable charges and expenses, for
 “ executing the said execution, the body, lands, or goods
 “ of the defendant, shall be thereupon forthwith discharged
 “ from the said execution, which shall likewise be entered
 “ upon record; but, notwithstanding, in each case such
 “ judgment shall remain as a further security to answer
 “ to the plaintiff and his personal representative, such da-

performance of covenants, defendant suffered judgment by default;
 whereupon the usual common law judgment in debt was entered
 for the recovery of the debt and damages; the plaintiff then pro-
 ceeded to suggest breaches, upon which suggestion, a writ of in-
 quiry was awarded and executed, and damages and costs as-
 sessed; after which, the plaintiff entered a second judgment for the
 damages assessed under the writ of inquiry, and further costs ad-
 judged by the court, and then entered a *remittitur* as to the costs.
 A writ of error having been brought, it was holden, that the second
 judgment could not stand; and thereupon it was adjudged, that
 the second judgment, with the amerciamment, should be reversed,
 and that the former judgment should remain unimpeached. *Han-*
kin v. Broomhead, 3 Bos. and Pul. 607.

(65) See note (63).

(66) See the form of this writ, 2 Wms. Saunders, 187. c.

(67) See the form of *postea* returned by justices of assize. 2 Wms. Saunders, 187. c.

“ mages as shall be sustained for further breach of any co-
 “ venant in the said indenture, &c., upon which the plain-
 “ tiff may have a *scire facias* (68), upon the said judgment
 “ against the defendant, or against his heir, terre-tenant, or
 “ his personal representative, suggesting other breaches of
 “ the said covenants or agreements; and to summon him
 “ or them respectively, to shew cause why execution
 “ shall not be had upon the said judgment; upon which
 “ there shall be the like proceeding, as was in the action of
 “ debt upon the said bond, for assessing damages upon trial
 “ of issues joined upon such breaches, or inquiry thereof,
 “ upon a writ to be awarded as aforesaid; and upon pay-
 “ ment or satisfaction as aforesaid, of such future damages,
 “ costs, and charges, all further proceedings are again to be
 “ stayed; and so *toties quoties*; and the defendant, his body,
 “ lands, or goods, shall be discharged out of execution as
 “ aforesaid.”

**VI. Debt on Bond of Ancestor against Heir—Plead-
 ings, Riens per Descent—Replication—Of the
 Liability of the Heir for the Value of the Land
 aliened under 3 & 4 W. & M. c. 14. s. 5.—Of
 the Liability of Devisee under the same Statute.
 Judgment—Execution.**

DEBT will lie against an heir, having assets by descent in fee simple, on the obligation of his ancestor, wherein the heir is expressly bound (69). The law considers the bond of

(68) See form of this writ against defendant, Tidd's Pract. Forms, 1st ed. p. 430. If the plaintiff proceeds to execution, without a *scire facias*, the court will set aside the execution, and order the money levied under it to be restored. Willoughby v. Swinton, 6 East, 550. In cases within this statute, although new breaches take place within a year after judgment recovered, yet the plaintiff is bound to sue out a *scire facias*. S. C.

(69) “ The executor more actually represents the person of the testator, than the heir does the person of the ancestor; for if a man binds himself, his executors are bound, though they be not named, but so it is not of the heir.” 1 Inst. 209. a.

See also Barber v. Fox, 2 Saund. 136. and ante, p. 50. S. C.

the ancestor, wherein the heir is bound, as becoming, upon the death of the ancestor, the heir's own debt, *in respect of the assets*, which the heir has in *his own right*, and holds him liable upon such bond, to the value of the land descended (70). Hence, the action, on the bond of the ancestor, ought to be brought against the heir in the debet and detinet (71). But, if it be brought in the detinet only^z, the omission of the debet, which was error at common law, will be cured after verdict, by stat. 16 & 17 Car. 2. c. 8.

And although it is the debt of the defendant^y, because his ancestor has bound him, yet he is not liable any farther than to the value of the land descended; and, as soon as he has paid his ancestor's debt, to the value of the land, he is entitled to hold the land discharged.

Where the obligor has heirs and lands on the part of his father and on the part of his mother, both heirs shall be equally charged^a.

If the defendant is only collateral heir of the obligor, the declaration ought to charge him specially, and the mesne descent ought to be stated.

In debt on bond against the defendant^x, as brother and heir to J. S., the defendant pleaded *riens per descent* from his brother. A special verdict was found, that the obligor was seised in fee, had issue, and died seised, and the issue died without issue; whereupon the lands descended to the defendant, as heir to the son of his brother. It was holden, that the issue was found against the plaintiff; for the defendant had nothing as immediate heir to his brother, but took by descent from the son of his brother; and although the defendant was chargeable as heir upon this bond, yet, being collateral heir only, the plaintiff ought to have declared specially. But this rule, as to stating the mesne descents in the declaration, applies only to descents from persons seised in fee simple in possession; for where A. being seised in fee^b, bound himself and his heirs in a bond, and having two

^x Combers v. Watton, 1 Lev. 224.

^y Buckley v. Nightingale, Str. 665.

^z 11 H. 7. 12 b.

^a Jenk's case, Cro. Car. 151.

^b Kellow v. Rowden, Carth. 126. per Holt C. J. and 2 Justices, Eyres J. dissenting.

(70) The debt is not a lien upon the land from the ancestor's death, but only capable of being made so by the suit of the party.

(71) "Because the inheritance of the ancestor, which creates a lieu upon the heir, is possessed by the heir *jure proprio*, and not *alieno*, as the personal estate is by the executor." Gilb. Debt, B. 2, c. 1.

sons, B. and C., limited the estate to himself for life, remainder to his eldest son B. in tail, remainder to his own right heirs, and died; whereupon B. became seised in tail, with remainder in fee expectant, and afterwards died, leaving a son D., who became seised in like manner, and afterwards died without issue; upon whose death the premises descended to C. in fee, the estate tail being then extinct; an action having been brought on the bond against C., as son and heir to A., and *riens per descent* from A. pleaded, it was holden, that the declaration charging the defendant as immediate heir of A., and not mentioning the mesne descent, was proper (72).

The plaintiff being presumed a stranger to the defendant's pedigree^c, it is not necessary for him to state in the declaration how the defendant is heir.

Of the Pleadings.—Riens per descent.—To this action the heir may plead, that he has not, nor had at the commencement of the suit, any lands or tenements by hereditary descent from the ancestor in fee simple^d. This plea is usually termed a plea of *riens per descent*.

Replication.—The common replication (73) to the preceding plea is, that the defendant had assets by descent in fee simple; upon which issue is usually joined. Upon this issue (74) the plaintiff must prove assets^e; but proof of assets in the county of A. will support an allegation of assets in the county of B.; for assets or not, is the substance of the issue, and the place is named only for conformity.

^c Denham v. Stephenson, Salk. 355. ^e Case cited in 6 Rep. 47. a.
^d Doctr. pl. 181.

(72) As to what shall be assets by descent, see Serjeant Williams's note on Jeffreson v. Morton, 2 Saund. 7. To the cases on this subject, there collected, may be added the case of Doe v. Hutton, 3 Bos. & Pul. 643. in which Lord Alvanley delivered a very elaborate judgment of the court.

(73) Except where the plaintiff takes advantage of the replication given by stat. 3 and 4 W. & M. c. 14. s. 6. for which see post, p. 542.

(74) Upon this issue the heir may give in evidence a bond, acknowledged by his ancestor to the king, and an extent thereon against the heir, [to the amount of the assets descended] per Holt C. J. Horne v. Adderley, Lord Raym. 735. But the extent only without the production of the bond, or examined copy thereof, is insufficient, per Holt C. J. Sherwood v. Adderley, Lord Raym. 734.

Upon this issue a question frequently arises, whether the heir takes by purchase or descent, with respect to which the following rules may be observed: If lands are devised to the heir, and the devise does not make any alteration, either in the tenure, quality, or limitation, of the estate; that is, if the devise conveys to the heir the same estate as the law would cast on him by descent, then the heir takes by descent, although by the terms of the devise there is either a possibility of a charge^f, or an actual charge and incumbrance on the lands^g, as payment of debts and legacies, and the like (75).

The language of the plea being, that the defendant had not any lands by descent, at the time of the original writ brought, or bill filed against him, it is evident that the defendant cannot avail himself of an alienation *pending* the suit, and that the lands so aliened will still remain charged^h. If upon issue joined on the plea of *riens per descent*ⁱ, the plaintiff prove that lands came to the defendant by descent, and the defendant give in evidence a conveyance of the same lands by himself to a stranger, before action brought, the plaintiff may, to encounter this evidence, prove that the conveyance was fraudulent, and therefore void by stat. 13 Eliz. c. 5.

Liability of Heir under Stat. 3 & 4 W. & M. c. 14.—At the common law, if the heir had made a *bonâ fide* alienation of the lands descended, before action brought, he was discharged^k, and he might have pleaded this in bar; consequently there was not any remedy against him at law; although in equity^l he was responsible for the value of the land aliened; but now, by stat. 3 & 4 W. & M. c. 14. s. 5. the heir is rendered liable in an action of debt, to the value of the land aliened before action brought or process sued out against him; and such execution shall be taken out upon any judgment obtained against such heir^m, to the value of the said land, as if it was his own debt; but land, *bonâ*

f Clerk v. Smith, Salk. 241.

g Allom v. Heber, Str. 1270. and 1 Bl. R. 22.

h 1 Inst. 102. a. b.

i Gooch's case, 5 Rep. 60. a.

k Termes de la ley, v. assets.

l Per Comyns B. in Crew v. Ld. Kilmain, Exchequer, T. 5 & 6 G. 2. MSS.

m Per Ld. Macclesfield Ch. in Coleman v. Winch, 1 P. Wms. 777.

(75) Charging land with the payment of an annuity or rent, will not prevent the heir's taking by descent, per Holt C. J. in Emerson v. Inchbird, Lord Raym. 728.

de, aliened before action brought, is specially exempted from such execution.

By the 6th section of the same statute, it is provided,
 “ that where debt upon a specialty is brought against any
 “ heir, he may plead *riens per descent* at the time of the
 “ original writ brought, or bill filed against him; and the
 “ plaintiff may reply (76) that he had lands, &c. from his
 “ ancestor, before original writ brought, or bill filed; and if,
 “ upon issue joined thereupon, it be found for the plaintiff,
 “ the jury (77) shall inquire of the value of the lands, &c.
 “ so descended; and thereupon judgment shall be given,
 “ and execution awarded as aforesaid, (that is, against the
 “ heir to the value of the land, as if the same were the pro-
 “ per debt of the heir;) but, if judgment be given against
 “ such heir, by confession of the action, without confessing
 “ assets descended, or upon demurrer, or *nil dicit*, it shall
 “ be for the debt and damages, without any writ to inquire
 “ of the lands, &c. descended.”

The heir cannot plead assets in the hands of the execu-

(76) To a plea of *riens per descent* the plaintiff replied, that the obligor (father of the defendant) died on such a day, and that the defendant, after his death, and before the action brought, had lands by descent from his father in fee simple, *unde querenti de debito prædicto satisfacisse potuit*, and concluded with a verification. Upon demurrer, it was objected, that the replication was ill, because the plaintiff had put the value of the lands in issue by these words, *unde, &c. de debito prædicto satisfacisse potuit*, which ought to have been omitted; because the statute is express, that after issue tried, the jury shall inquire of the value; so that it is matter of inquiry only, *ex officio*, and not to be the point of the issue; but the court held the replication good; observing, that if *unde, &c. de debito præd. satisf. pot.* had been omitted, it might have been a good cause of objection; for the statute does not require any alteration of the form of the usual replication, except only as to the time concerning the assets by descent; and the conclusion, which (before the statute) was to the country, must now be with an averment, in order to give the defendant an opportunity of answering the new matter alleged in the replication. *Redshaw v. Hesther*, Carth. 353. See the pleadings in this case, 5 Mod. 119.

(77) In *Jeffry v. Barrow*, 10 Mod. 18. Powis J. and Eyre J. were of opinion, that by “ the jury,” in this clause, must be understood the jury that tried the cause; and consequently, if that jury omitted to inquire of the value of the lands, such omission could not be supplied by another jury.

tors^a; for it is at the election of the obligee to sue either the heir, or the executors.

A plea by the heir^a, that he claims to retain a certain sum for money laid out in *repairs* (not stating them to be necessary repairs) of the tenements descended, cannot be supported.

Liability of Devisee under Stat. 3 & 4 W. & M. c. 14.—Before the statute of 3 & 4 W. & M. c. 14. persons who had bound themselves and their heirs by bond, or other specialties, used frequently to alienate the lands of which they were seised in fee simple by devise, for the purpose of defrauding their creditors; because, at common law, such lands in the hands of the devisee or alienee, were not liable to the specialty creditor. To remedy this inconvenience it was enacted, by stat. 3 & 4 W. & M. c. 14. (the general view of which is, to prevent such creditors from being defrauded of their debts, and to put the devisee on the same footing with the heir,) sec. 2. “that all wills, limitations, dispositions, or appointments of any lands, &c. or of any rent, &c. or charge out of the same, whereof any person, at the time of his death, is seised in fee simple, in possession, reversion, or remainder, or has power to dispose of the same by will, shall be deemed only as against such creditors, their heirs, successors, executors, &c. fraudulent and void.” The third section provides, “that such creditors may maintain *debt* (78) upon their bonds and specialties, against the heirs at law of such obligors, and against such devisees *jointly* (79); and such devisees shall

^a 10 H. 7. 8. b. per Vavasor J. C. B. o Shetelworth v. Neville, 1 T. R. 454. and Cape's case, 1 And. 7. S. P. adjudged.

(78) In *Wilson v. Knubley*, 7 East, 128. a question arose, whether this statute gave an action of covenant against the devisee, such an action having been brought against the devisee, the heir being dead; but it was holden, that it did not; Grose J. observing, that at common law, neither debt nor covenant could have been maintained against the devisee, but the legislature had given a remedy against him by this statute; that remedy, however, was express, and was confined to the action of debt. And though the word “specialties” was used as well as bond, yet construing the whole together, it must be confined to such specialties, on which the action of debt lies.

(79) For the form of the declaration, against the heir and devisee jointly under this statute, see Clift. Entr. 243. pl. 19. Lill. Ent. 145. Ibid. 529, 530. 2 Rich. C. P. 241.

“ be chargeable, for a false plea, in the same manner as the
 “ heir is for a false plea, or for not confessing the lands de-
 “ scended to him.” The 4th section contains an exception
 in favour of devises or dispositions made for the payment of
 debts^p, or portions for children, other than the heir at law,
 in pursuance of any marriage contract, *bonâ fide* made be-
 fore marriage. The 7th section provides, “ that every de-
 “ visee made liable by this act, shall be chargeable in the
 “ same manner as the heir, by force of this act^q, notwith-
 “ standing the lands, &c. to him devised, shall be aliened
 “ before action brought.”

This statute was intended to prevent three inconve-
 niences: 1. that the creditor should not be defrauded by a
 devise; or 2. by alienation; 3. that the heir should not be
 charged with the whole debt by his false plea; for, at the
 common law, if on issue joined on *riens per descent*, it were
 found, that the heir had any land, however little, *per descent*
 in fee simple, he was chargeable with the whole debt, for
 his false plea; and the alteration introduced by this statute
 was to enable the creditor to recover, after the alienation of
 the heir, but then he is to take proof of the value upon him-
 self, and recover no more of his debt than the value of the
 lands amounted to.

If debt is brought on the obligation of the ancestor
 against an infant heir^r, he may plead his non-age and pray
 that the parol may demur. This privilege is confined to
 infant *heirs*^s, to whom lands have come by descent from the
 specialty debtor; and not being expressly given to infant de-
 visees by the preceding statute, they cannot claim the be-
 nefit of it.

Judgment.—If the heir confesses the action, and declares
 with certainty the assets which he has by descent, the judg-
 ment shall be that the plaintiff do recover his debt and
 damages^t, to be levied of the assets descended (80).

p See *Gott v. Atkinson*, Willes, 521.

q See s. 5. ante.

r *Gilb. Hist. of C. B.* 56.

s *Plaquet v. Beebey & others*, 4 East's
 R. 485.

t *Davye v. Pepys*, Plow. 439.

(80) Under this judgment, the plaintiff is entitled to have in
 execution *all* the land descended. And this was the rule at the
 common law, although the lands in the possession of the ancestor
 were not liable to any execution. And the reason of the distinc-
 tion appears to be this; that the assets descended are the only fruit
 which the creditor can derive from an execution against the heir,
 the goods and chattels of the debtor belonging to his personal re-
 presentative. Per Sir E. Coke, in *Harbert's case*, 3 Rep. 12. a.

If the heir confesses the action^a, and says that he has nothing by descent but a reversion, after the death of A. B. of so many acres of land, situate, &c. the plaintiff may pray a special judgment, that he recover the debt and damages to be levied of the said reversion, *quando acciderit*^z.

If the heir pleads *riens per descent*^y, or payment by a co-obligor^z, and it is found against him, the judgment shall be general; that is, to recover the debt and damages.

Execution.—As the judgment in debt against an heir, upon *riens per descent* pleaded and found against him^a, is general, so is the execution. And the plaintiff may have execution by writ of elegit, of a moiety of all the lands of the heir; as well of those which the heir has by purchase, as of those which he hath by descent (81).

If the heir suffers judgment to go by default, and does not shew with certainty the assets descended, the judgment shall be general, and the execution may be awarded against the heir as for his own debt, by *capias ad satisfaciendum* against his person^b, or *fi. fa.* against his goods and chattels^c.

If judgment is given against the heir upon demurrer (82), the body of the heir may be taken in execution^d.

^a Dy. 373. b.

^x Per Holt C. J. Carth. 129.

^y 21 Ed. 3. 9. b. pl. 28. Doctr. pl. 181.

Allen v. Holden, 2 Rol. Abr. 71. pl. 8. Sty. 287, 288. S. C.

^z Brandlin v. Milbank, Carth. 93.

^a 21 Edw. 3. 9. b. pl. 28. Hinde v. Lyon, 2 Leon. 11.

^b Barker v. Borne, Moore, 522. and Cro. Eliz. 692. Trewiniard's case, Plowd. 440. b. S. P.

^c Poxon v. Smart, C. B. Hill. 4 G. 2. MSS.

^d Grenesmith v. Brackhole, cited in Plow. 440. b.

(81) It seems, however, that the plaintiff is not compelled to sue an elegit in this case, but he may suggest that the defendant has certain lands (describing them) by descent, and pray execution against such lands; for possibly the heir may not have any other than those which he has by descent. 2 Rol. Ab. 71. pl. 3.

(82) And so, if the heir is condemned on any plea whatsoever, or by default, or without plea for any cause, the practice is for the plaintiff to have execution of the body of the heir, or his goods, or elegit of his lands, unless he confesses the debt and shews the certainty of the lands descended. Per Plowd. in Davye v. Pepys, Plow. 440. b. It was said by Holt C. J. delivering the judgment of the court in Smith v. Angell, Ld. Raym. 783. that the foregoing resolution in Plowden had been always held to be law.

VII. *Debt on Judgment.*

DEBT lies upon a judgment, within or after the year after the recovery^e. An action of debt may be maintained in the Court of King's Bench or Common Pleas, upon a judgment recovered in one of the courts of the city of London by special custom; although the original action could not have been brought in the superior courts^f. Debt lies on a judgment for damages in a real action; for, by the judgment, the damages are reduced to personalty; as for damages recovered in an action of waste^g. So on a judgment in *scire facias* on a recognizance^h. Debt also lies upon a judgment of nonsuit, for costs in an inferior court. In an action of this kind, a general statement of the proceedings in the inferior court will be sufficient, without setting forth the plaint and the subsequent proceedings thereon; neither is it necessary to aver, that the plaint in the court below was levied for a cause of action arising within its jurisdictionⁱ.

Debt on judgment lies only where the judgment remains unsatisfied^k. Hence, where the defendant had been taken in execution on a judgment, and afterwards was discharged out of custody, with the consent of the plaintiff, upon entering into an agreement to pay the debts by instalments, part whereof the defendant had accordingly paid, but had failed in payment of the remaining part; it was holden, that the plaintiff could not maintain an action upon the judgment.

The venue in this action must be laid in the county where the judgment was given, and not in the county where the original cause of action arose^l. The defendant cannot plead *nil debet*^m; because the judgment is conclusive evidence of the debt. But if there be not any such record as the plaintiff has declared on, the defendant must plead *nil tiel record*; which issue is tried by producing the record itself, if it be a record of that court where the action is brought; but if it be a record of another court, then it is to be certified unto the court where the action is depending; and, if there be a variance between the record declared on and the record produced or certified, the plaintiff fails in his

^e 43 Edw. 3. 2. b.

^f *Mason v. Nicholls*, 1 Roll. Abr. 600. l. 45.

^g 43 E. 3. 2.

^h *Lovelepe's case*, 2 Leon. 14.

ⁱ *Murray v. Wilson*, 1 Wils. 316.

^k *Vigers v. Aldrich*, 4 Burr. 2492. recognised in *Jaques v. Withy*, 1 T. R. 557.

^l Hob. 196.

^m *Gilb. Debt*.

proof. See further as to this plea, and the replication thereto, ante, Sect. IV.

A plea of *nil tibi record*^a, pleaded to an action of debt on an Irish judgment recovered, must conclude to the country; for though, since the union, such judgment be a record, yet it is only proveable by an examined copy on oath, the veracity of which is only triable by a jury.

A writ of error pending on the judgment may be pleaded in abatement^o, but not in bar^p. If the defendant bring a writ of error, and the plaintiff bring another action on the judgment and recover, he cannot sue out execution on the second judgment, until the writ of error be determined^q.

The more regular, as well as the least expensive mode by which a plaintiff may reap the benefit of his judgment is, by writ of execution; hence, the proceeding by action of debt being considered as a vexatious and oppressive mode of enforcing the judgment, is discountenanced by the courts in Westminster hall; and by a late statute (43 G. 3. c. 46. s. 4. Lord Ellenborough's act) "the plaintiff in such action shall not recover costs, unless the court in which the action is brought, or some judge of the same court, shall otherwise order."

VIII. *Debt for Rent Arrear—Stat. 4 G. 2. c. 28. against Tenants holding over after Notice from Landlord—Stat. 11 G. 2. c. 19. against Tenants holding over after Notice given by themselves—Declaration—Debt for Use and Occupation—Pleadings—Evidence.*

If a lease be of lands or tenements for years^r, or at will^s, rendering rent, debt lies for the recovery of rent arrear, by the common law. So if a lease be for life^t, after the estate of freehold determined, debt lies for the arrears, by the common law: And now, by stat. 8 Ann. c. 14. s. 4. though a lease for life be continuing, any person having rent

ⁿ Collins v. Ld. Mathew, 5 East, 473. ^r Lit. s. 58.

^o Aby v. Buxton, Carth. 1. ^s Id. s. 72.

^p Rogers v. Mayhoe, Carth. 1. ^t 1 Rol. Abr. 596. pl. 11.

^q Taswell v. Stone, 4 Burr. 2454. Benwell v. Black, 3 T. R. 643.

due on such lease, may bring debt for the same, in the same manner as if due upon a lease for years.

At common law, if a person seised of rent-service, rent-charge, rent-seck or fee farm in fee simple died^a, and there was rent arrear, neither his heir or executor could maintain an action of debt for such rent: the heir was not competent to sue, because he was a stranger to the personal contracts of his ancestor; and the executor was incompetent, inasmuch as he did not represent his testator as to any contracts relating to the freehold and inheritance. To obviate this inconvenience it was enacted by stat. 32 H. 8. c. 37. s. 1. that an executor or administrator of any person seised of rent-service, rent-charge, or rent-seck, or of a fee farm rent, in fee, in tail, or for life, might maintain debt against the person who ought to pay the same, and his personal representative (83).

The action must be brought against the persons who took the profits when the rent became in arrear^x, or against their executors or administrators.

If A. make a lease for life^y, or a gift in tail, reserving a rent, that is a rent service within this statute.

The act is remedial^z, and extends to the executors of all tenants for life.

If lessee for years assign over the term reserving a rent, he may maintain debt for such rent arrear, although he has not any reversion^a.

By stat. 4 Geo. 2. c. 28. s. 1. "If tenants for life, lives, or years (84), or other persons coming into possession of any lands, &c. under or by collusion with such tenants, shall

^a 1 Inst. 162. a.

^x 1 Inst. 162. b.

^y Ib.

^z Hool v. Bell, Ld. Raym. 172.

^a Newcombe v. Harvey, Carth. 161.

(83) The action is local, and must be brought where the land lies. Bull. N. P. 177.

(84) "I am aware that a tenant for half a year, or a smaller portion of a year, may, for some purposes, be considered and denominated a tenant for years. But this is a penal statute, and to be construed strictly. I cannot, therefore, include a tenant *from week to week* in the description of tenants for life, lives, or years; and I do not remember any instance of a tenant for a less time than a year being held within this statute." Per Ld. Ellenborough C.J. Lloyd v. Rosbee, 2 Camp. N. P. C. 453.

“ wilfully (85) hold over after the determination of their
“ term (86), and after demand made (87), and notice in writ-
“ ing (88) given, for delivering the possession thereof, by
“ their landlords or lessors, or persons entitled to the rever-
“ sion or remainder of such lands, &c. or their agents (89);

(85) A tenant who holds over, under a fair claim of right, will not be considered as wilfully holding over within the meaning of this statute: though it may be decided eventually, that he had no right. *Wright v. Smith*, 5 Esp. N. P. C. 203.

(86) Where the demise is for a certain time, e. g. for one year and no longer, a notice to quit is not necessary at the end of the year to put an end to the tenancy. 8 East, 361.

(87) In *Wilkinson v. Colley*, 5 Burr. 2694. the court considering this as a remedial law in favour of landlords, the penalty being given to the party grieved, held, that a notice to quit in writing included a demand.

On the authority of this case it was holden*, by three judges, that where a woman, tenant from year to year, had received a written notice to quit, and before the expiration of the year married, it was not necessary for the landlord to make a demand on the husband, in order to entitle him to maintain an action against the husband on this statute, for wilfully holding over. *Chambre J.* differed from the other judges, conceiving, that a demand ought to be made upon the party against whom a penal action is brought. *N.* In a case of this kind the husband may be sued alone, and it is not necessary to join the wife for conformity, the husband being in possession of the estate at the time when possession is to be delivered, and consequently the offence being committed by him; for the offence, which consists in not complying with the demand to deliver possession at the time, when it ought to be complied with, is not complete until the day for delivering possession arrives. The demand need not be made either on or before the expiration of the term, but may be made afterwards; e. g. six weeks afterwards, the landlord not having in the mean time done any act to recognize the defendant as continuing to be his tenant; but the landlord will be entitled to double the yearly value only from the time of giving notice to quit and making demand. *Cobb v. Stokes*, 8 East, 358.

(88) Notwithstanding the order in which the words stand in this stat., from which it should seem that the notice ought to be given *after* the determination of the term, yet the notice may be given *before* the expiration of the term. *Cutting v. Derby*, 2 Bl. R. 1075.

(89) A receiver appointed under an order of the Court of Chancery, is an agent within the meaning of this statute. *Wilkinson v. Colley*, 5 Burr. 2694.

* *Lake v. Smith*, 1 Bos. & Pul. N. R. 174.

“ such persons so holding over shall, for the time they shall
 “ so hold over, pay to the persons kept out of possession,
 “ their executors, administrators or assigns, at the rate of
 “ double the *yearly value* of the lands, &c. for so long time
 “ as the same are detained, to be recovered by action of
 “ debt, whereunto the defendant shall be obliged to give
 “ special bail, against the recovery of which penalty there
 “ shall not be any relief in equity.”

One tenant in common may maintain an action on this statute^b, without his companion, for double the yearly value of his moiety.

An action on this statute may be brought after a recovery in ejectment. The defendant^c, after having held of the plaintiff a farm for fourteen years, received a regular notice to quit on the 12th of May 1806, and the possession was then demanded of him; but he refused to deliver it up, and held over till the 7th of February 1807: whereupon the plaintiff brought his ejectment against the defendant, and recovered possession; and afterwards brought this action of debt upon the stat. 4 Geo. 2. c. 28. for *double the yearly value* of the premises, in the interval between the expiration of the notice to quit, (which was the day of the demise in the ejectment) and the time of recovering possession under the ejectment. The declaration was in the usual form, alleging the demise to and holding by the defendant; the demand of possession and notice in writing to deliver up the premises at the end of the term, on the 12th of May 1806; the subsequent refusal of the defendant, and his wilfully holding over for three quarters of a year after the 12th of May; and the annual value of the premises. It was objected on the part of the defendant, that the plaintiff having before recovered the premises by the ejectment, and thereby treated the defendant as a *trespasser*, the action of debt upon the statute, in which, as it was said, the defendant was proceeded against as *tenant*, could not be maintained; but, per Lord Ellenborough C. J. there is no incongruity in the landlord's bringing this action for the double value after a recovery in ejectment. The legislature considered, that in many cases, the single value might not be a compensation to the landlord for having been kept out of possession by the misconduct of the tenant, and therefore they gave him double the value. It has no reference to any antecedent remedy which the landlord had to recover possession by ejectment,

^b *Cutting v. Derby*, 2 Bl. Rep. 1077. ^c *Soulsby v. Nevin*, B. R. 48 G. 3
 9 East, 310.

but is cumulative. The two actions are brought *diverso intuitu*; the ejectment is in order to get possession of the premises wrongfully withheld; the action of debt for the double value is in order to indemnify the landlord for the wrong. The other judges concurred with the C. J.

In the following case the plaintiff declared in the first count for double the yearly value^d; and in the second, for use and occupation. The defendant pleaded as to the demand in the first count, and as to parcel of the demand in the second count, *nil debet*; and as to the residue, (being the amount of the single rent) the defendant pleaded a tender, and paid the money into court, which the plaintiff took out of court, but proceeded to trial. It was contended on the part of the defendant, that there should be a non-suit, because the plea of tender of *rent* covered the whole period, for which the double value was claimed in the first count; and the acceptance of the tender, which adopted the terms and character of it, must be taken to be an admission by the landlord, that the defendant held the premises mentioned in the second count, as tenant to him during the whole period for which the rent was claimed, and that he received the tender, as of *rent* for the same premises; and consequently it operated as a waiver of the penalty. But the court held, that plaintiff was not estopped from taking the money as part of the larger sum claimed, and that going on with the suit shewed that he did not mean to take it in satisfaction of the lesser sum.

Stat. 11 G. 2. c. 19. s. 18.—By *stat. 11 Geo. 2. c. 19. s. 18.*
 “ If any tenant (90) shall give notice (91) of his intention
 “ to quit the premises holden by him, at a time mentioned
 “ in such notice, (92) and shall not deliver up the possession thereof accordingly, then such tenant, his executors,
 “ or administrators, shall, thenceforward, pay to the land-

d Ryal v. Rich, 10 East, 48.

(90) A tenant for a year under a parol demise, is a tenant within this statute. *Timmins v. Rawlinson*, 3 Burr. 1603.

(91) It is not necessary that this notice should be in writing. *Timmins v. Rawlinson*, 3 Burr. 1603.

(92) There must be some fixed time mentioned. A notice that the tenant will quit as soon as he can possibly get another situation will not enable the landlord to recover under this statute, although he can prove that the tenant had got another situation. *Farrance v. Elkington*, 2 Camp. N. P. C. 591.

“ lord double the *rent* which he should otherwise have paid,
 “ to be levied (93), sued for, and recovered, at the same
 “ times and in the same manner as the single rent could;
 “ and such double rent shall continue to be paid during all
 “ the time such tenant shall continue in possession (94).

Declaration.—Debt for rent, by the lessor against the lessee, may be brought either where the land lies, or the deed was made^e; but debt by the grantee of the reversion against lessee^f, or by lessor against the assignee of the term^g, or by grantee of the reversion against assignee of the term^h, is maintainable on privity of estate only, consequently is local, and must be brought in that county where the lands are.

If the venue is laid in the wrong county, advantage may be taken of it on demurrerⁱ.

It is a general rule, that, wherever an action is founded on a deed, the deed must be declared upon. But the action of debt, for rent arrear, forms an exception to this rule; for in this case it is not necessary to declare upon the deed^k.

Debt against an executor for rent incurred during the life of the testator, must be in the *detinet* only^l. But for the rent incurred after the death of the lessee, the action may be brought either in the *debet* and *detinet*^m, or in the *detinet* onlyⁿ; for the lessor has his election (95). Debt by^o or

^e *Patterson v. Scott*, Str. 776.

^f *Bord v. Cudmore*, Cro. Car. 183.

Trahearne v. Cleabrooke, W. Jones,

49. *Thrale v. Cornwall*, 1 Wils.

165.

^g Per Cur. in *Patterson v. Scott*, Str.

776.

^h See *Barker v. Damer*, Carth. 183.

ⁱ 2 Lev. 80. 1 Wils. 165.

^k Adm. per Cur. in *Atty v. Parish*, 1 Bos. & Pul. N. R. 109.

^l 1 Roll. Abr. 603. (S.) pl. 9.

^m *Rich v. Frank*, Cro. Jac. 233. 1 Bulstr. 92. S. C. *Mawle v. Cacyffyr*, Cro. Jac. 549.

ⁿ *Royston v. Cordrye*, Aleyn, 42.

^o *Smith v. Norfolk*, Cro. Car. 225.

(93) That is, by distress.—N. This remedy was pursued in *Timmins v. Rawlinson*.

(94) It seems, that there would be an incongruity in applying the remedy given by this statute for double rent after the remedy by ejectment, which treats the person in possession as a trespasser. Per *Ld. Ellenborough C. J.* 9 East, 314.

(95) The only inconvenience of suing in the *detinet*, is to the plaintiff himself, who waves his right to demand satisfaction out of the estate of the defendant, and contents himself with what the testator's estate will afford. Aleyn, 43.

against^p an executor or administrator, for rent arrear, partly in time of testator or intestate, and partly in time of executor or administrator, is well brought in the detinet only. If, in such case, the plaintiff in the same declaration charge the defendant in the detinet for the rent arrear in time of testator or intestate^q, and in the debet or detinet for the rent arrear in his own time, the declaration will be bad on demurrer; because several judgments would be required. It seems, therefore, that if the lessor, in such case, will not wave his right of demanding satisfaction out of the estate of the defendant, he must bring two actions.

Detinet for rent against an executor of lessee is transitory^r, because it is for arrears in the testator's time: but when it is in the debet and detinet for rent accrued in the executor's time, it must be where the land lies^s; for in this case the executor is charged as assignee on the privity of estate, and not on the privity of contract.

If A. demises land by indenture to B. for years^t, yielding rent, and B. dies, making C. his executor, the lessor may have debt against the executor for the rent reserved, and arrear after the death of the lessee, although the executor never entered nor agreed; for the executor represents the person of the testator, and the testator by the indenture was estopped and concluded during the term to pay the rent upon his own contract; and, therefore, although the rent is higher than the profit of the land, yet the executor cannot wave the land, but, notwithstanding that, he shall be charged with the rent (96).

Debt for Use and Occupation.—In the case of demises, not

^p *Aylmer v. Hide*, M. 13 G. 2. B. R. MSS. ^s *Cormel v. Lisset*, 2 Lev. 80.

^q *Salter v. Codbold*, 3 Lev. 74.

^t Agreed by 3 Justices in *Howse v. Webster*, Yelv. 103.

^r *Gilb. Debt*, B. 2. c. 2.

(96) See also *Helier v. Casebert*, 1 Lev. 127. where Wyndham J. said, that an executor cannot wave a term, so as not to be charged for the rent, if he has assets; for he is bound to perform all the contracts of the lessor, if he has assets, be the rent above the value of the land or not; which was not denied. And Kelynge J. said, that he could not so wave it, but that he should be charged in the detinet, on which the assets would come into question. And if he continues the possession, he shall be charged in the debet and detinet in respect of the perception of the profits, whether he has assets or not; to which Twysden J. agreed. See also *Billinghurst v. Speerman*, Salk. 297. to the same effect.

by deed, the action of debt for use and occupation has been substituted for the ancient method of declaring in debt for rent. The first case in which it was determined, that an action of debt might be maintained for use and occupation, was the case of *Stroud v. Rogers*, H. 32 G. 3. C. B. reported shortly in a note to a similar determination in the Court of King's Bench, in *Wilkins v. Wingate*, M. 35 G. 3. B. R. 6 T. R. 62. The generality of the form of declaring, permitted in the action for use and occupation, renders it very convenient; for it has been holden, that a declaration in debt, not setting forth any demise in the premises^a, nor for what term, or what rent they were demised, nor how long the defendant had occupied them, nor when the sum claimed to be due for the use and occupation became due, nor for what space of time, is sufficient to enable the plaintiff to recover for use and occupation. So where the declaration omitted the place where the premises were situated^x, it was holden good on special demurrer, there not being any locality in the action. The inconvenience resulting to the defendant from this general form of declaring, is remedied by permitting the defendant to call on the plaintiff for the particulars of his demand.

Pleadings.—General Issue.—In debt for rent, upon a demise of land, if the rent be reserved by deed indented, the defendant may plead *non est factum*^y; if without deed, *non dimisit*, or nothing in arrear, or that the defendant never entered. So in debt for rent, the defendant may plead *nil debet*, although the rent be reserved by indenture; for the indenture does not acknowledge a debt like an obligation, since the debt accrues by the subsequent enjoyment (97).

Upon *nil debet*, the last receipt is presumptive evidence that all the rent before the receipt is paid^z. The plea of *nil debet* traverses the whole declaration^a.

In debt for rent, against the lessee^b, or his personal representative^c, an assignment before the rent became due,

^a *Stroud v. Rogers*, *sup.* and cited by Le Blanc J. in *King v. Frazer*, 6 East, 354.

^x *King v. Frazer*, 6 East, 348.

^y Gilb. C. B. 61. 3rd Ed.

^z Gilb. Debt, B. 3. c. 2.

^a Per Holt C. J. Salk. 562.

^b Walker's case, 3 Rep. 22. a.

^c *Helier v. Casbert*, 1 Lev. 127.

(97) "There is a difference, where the specialty is but an inducement to the action, and matter of fact is the foundation of it, there *nil debet* will be a good plea; as in debt for rent by indenture, the plaintiff need not set out the indenture." Per cur. in *Warren v. Cousett*, Ld. Raym. 1503.

cannot be pleaded in bar of the action; for the privity of contract remains notwithstanding the assignment: but an assignment *and an acceptance on the part of the lessor of the assignee as his tenant* may be pleaded in bar either by the lessee^d, or his personal representative^e, because the lessor's acceptance of the assignee, as his tenant, destroys the privity of contract (98).

Upon this principle it was holden, that debt would not lie on the *reddendum* against the lessee^f for rent accruing after his bankruptcy, when he had ceased to occupy the premises, and the assignee was in possession under the commissioners' assignment, the lessor's assent to such assignment being virtually in the statute authorizing the assignment, and being equivalent to an express assent (99).

Eviction.—In debt, as in other remedies for rent arrear, an eviction may be pleaded in bar, for that occasions a suspension of the rent; but care must be taken that an eviction, or such facts as amount in law to an eviction, be stated in the plea; for, if a mere trespass^g, or an illegal ouster^h only, be stated, the plea will be insufficient. See post, n. 103.

If the land be evicted, or the lease determine before the legal time of payment, no rent shall be paidⁱ; because there shall never be any apportionment in respect of part of the time, as there shall be in respect of part of the land (100). Hence, at common law, if tenant for life made a lease for

d *Marsh v. Bracc*, Cro. Jac. 334.

e *Marrow v. Turpin*, Cro. Eliz. 715.

Moor, 600, pl. 829. S. C.

f *Wadham v. Marlowe*, M. 25 G. 3.

B. R. 8 East, 314. n.

g *Reynolds v. Buckle*, Hob. 326.

Hunt v. Cope, Cowp. 242.

h *Vochell v. Dancastell*, Moor, 891.

i *Clun's case*, 10 Rep. 128. a.

(98) Although debt will not lie in this case, yet covenant may be maintained for the breach of an express covenant. *Bachelor v. Gage*, Cro. Car. 188. ante, p. 418.

(99) But assumpsit lies against a lessee, from year to year, upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy, and the occupation of his assignees during part of the time for which the rent accrued. *Boot v. Wilson*, 8 East, 311. and post, chap. 40. on Use and Occupation.

(100) "Where our books speak of an apportionment in case where the lessor enters upon the lessee, *in part*, they are to be understood where the lessor enters *lawfully*, as upon a surrender, forfeiture, or such like, where the rent is lawfully extinct in part." 1 Inst. 148. b.

years, rendering rent at Easter, and the lessee occupied for three quarters of a year, and in the last quarter before Easter the tenant for life died; in this case there was not any apportionment of rent for the three quarters of a year (101). But now by stat. 11 Geo. 2. c. 19. s. 15.

“ Where tenant for life dies before, or on the day on which
 “ rent is reserved or made payable, upon any demise or
 “ lease of lands, &c. which determines on the death of such
 “ tenant for life, his personal representative may in an action
 “ on the case, recover from the under-tenant of such lands,
 “ &c., if the tenant for life die on the day on which the
 “ same was made payable, the whole, or if before such day,
 “ then a proportion of such rent, according to the time the
 “ tenant for life lived, of the last year or quarter of a year, or
 “ other time in which the said rent was growing due, making
 “ all just allowances or a proportional part.”

Infancy.—The general plea of infancy cannot properly be pleaded to debt for rent arrear on an indenture of lease.

In debt for rent, the defendant pleaded infancy at the time of the lease made; upon demurrer, the court held^k that as the lease might be for the benefit of the infant, it was voidable only at the election of the infant, by waving the land before the rent day; but it not being shewn, that the rent was of greater value than the land, and the defendant being of full age before the rent day, the plaintiff had judgment.

It appears from another report of the preceding case^l, that the court thought, that the circumstance of the lessee *having continued to occupy*, after he came of full age, rendered him liable for arrears incurred before he was of age.

Nil habuit in tenementis.—If the plaintiff declares upon an indenture of lease, the defendant cannot plead *nil habuit in tenementis*^m, or *non dimisit*; because the defendant, by the execution of the counterpart of the indenture, is estopped from controverting either the power of the plaintiff to do

^k Ketsey's case, Cro. Jac. 320. 2 Bulstr. 60. S. C. by the name of Kirton v. Elliott, cited by Yates J. in Evelyn v. Chichester, 3 Burr. 1719.

^l 1 Rol. Abr. 731.

^m Gilb. Debt. B. 3. c. 3.

(101) And the same rule still holds with respect to dividends in the public funds, which are made payable on certain days, like rent. These dividends go to the person to whom they are due at the time, and if the tenant for life die between the times when they are payable, there cannot be any apportionment. 2 Ves. 672.

mise or the actual demise; but otherwise it is, where the demise is by deed pollⁿ, or by parol.

In debt for rent reserved upon a lease by indenture^o, if the defendant pleads *nil habuit in tenementis*, the plaintiff need not reply the estoppel, but may demur; because the declaration being on the indenture, the estoppel appears on the record (102).

If to debt on a demise, without deed, the defendant pleads *nil habuit in tenementis*, the plaintiff ought in his replication to shew specially what estate he had in the premises^p. But if, instead of doing this, he replies, "that he had a good and sufficient title," and issue is joined thereon and found for the plaintiff, the defect in the replication will be aided by the verdict.

Riens in Arrear.—Riens in arrear is a good plea in bar to this action:

Plaintiff, as assignee of the reversion, declared in debt, upon an indenture of lease^q, against the assignee of the term for rent arrear. The defendant pleaded, "that nothing of the rent is in arrear and unpaid, as by the declaration is above supposed." On special demurrer, the court held the plea good; Lord Mansfield C. J. observing, that it was the same as if the defendant had said *nil debet*; that the plea related to the time of the action, and that it was the general issue.

Statute of Limitations.—By stat. 21 Jac. 1. c. 16. s. 3. actions of debt for arrearages of rent shall be commenced and sued within six years next after the cause of such actions. This statute is confined to actions for arrears of rent^r, upon a demise without deed, and does not extend to cases of rent reserved by specialty.

Evidence.—If the defendant pleads, levied by distress, and so *nil debet*, and issue is joined thereon^s; proof of payment will support the issue (103). In debt for rent upon a lease

ⁿ Per Curiam, *Lewis v. Wallis*, 1 Wils. 314.

^o *Heath v. Verneden*, 3 Lev. 146.
Kemp v. Goodall, Salk. 277.

^p *Gill v. Glasse*, Yelv. 227.

^q *Warner v. Theobald*, Cowp. 589.

^r *Freeman v. Stacy*, Hutt. 109.

^s *Cecil v. Harris*, Cro. Eliz. 140.

(102) Otherwise, if the plaintiff had declared *quod cum dimisisset*. See *Speuk's case*, Hob. 206.

(103) And per Holt C. J. a release may be given in evidence; for it proves that there is not any debt, and that is the issue. *Galaway v. Susack*, Salk. 284. In debt for rent upon the plea of

for years, issue being joined^t, whether the rent were paid or not, the defendant gave in evidence, that, by the command of the lessor, he had paid the rent in discharge of certain rent-charges out of the lands; and this was holden good; for payment to another, by the plaintiff's appointment, is payment to himself.

Upon reference from nisi prius for the opinion of the court in debt for rent upon a demise laid of three rooms^u, where it appeared in evidence, that the demise was of three rooms, with the use of the furniture; it was holden by the court, that the plaintiff had proved the demise laid in the declaration; Eyre C. J. observing, that if a man demises a house with the use of his stock, no term can be raised out of the stock. Nothing is demisable, but what is in demesne. A flock of sheep is not demisable, nor the furniture here. 5 Rep. 17. If a man demises house and land with a stock of cattle, the rent issues only out of the land, and the other enures by way of covenant. So, Dyer, 212., where a public house with goods is demised, the rent issues only out of the house. So if a flock of sheep be demised with land, and the sheep die, there shall be no abatement of rent on that account; for the rent issues only out of the land, and a term for years cannot be created out of a personal chattel.

^t Taylor v. Beal, Cro. Eliz. 222.

^u Walsh v. Pemberton, C. B. M. & G. 2. Serjt. Leed's MS.

nil debet, the defendant cannot give in evidence disbursements for necessary repairs, where the plaintiff is bound to repair, for he might have had covenant against him; but he may give in evidence entry and eviction by the plaintiff. Bull. N. P. 177. I am not aware of any solemn adjudication on this point, viz. that an eviction may be given in evidence on *nil debet*, but there are several *dicta* to this effect. See Gilb. Law, Evid. 282.—Gilb. Debt, B. 3. c. 2.—1 Mod. 35.—Id. 118.—Brown's case, 1 Vent. 258.—Drake v. Reeve, 1 Sidf. 151. In the last mentioned case, it is admitted, that this point had been questioned formerly. See Wingfield v. Seckford, 2 Leon. 10. where it was the opinion of three judges, Dyer, Manwood, and Mounson, that eviction could not be given in evidence on *nil debet*.

IX. Debt against Sheriff, &c. for Escape of Prisoner in Execution—Stat. 13 Ed. 1. c. 11. 1 R. 2. c. 12.—What shall be deemed an Escape—Of Recaption—By whom the Action for an Escape may be brought—Against whom—Declaration—Pleadings—Evidence.

By the common law, sheriffs and gaolers were obliged to keep persons in execution “in close and safe custody;” but if such prisoners escaped, the only remedy which the creditor had against the gaoler, was, by an action upon the case, grounded upon the tort; for, at the common law, an action of debt did not lie for an escape. The statute of Westminster the second (13 Ed. 1. c. 11.) first gave the action of debt against the gaoler, who permitted the escape of a person committed to prison by auditors for arrears of account. That statute, having authorised the commitment of the bailiff or receiver, in case he is found in arrear, proceeds thus, *Et caveat sibi vicecomes vel custos* (104), *ejusdem gaolæ, sive sit in libertate sive non, quod per commune breve, quod dicitur replegiare, vel alio modo sine assensu* (105) *domini ipsum a prisonâ exire non permittat; quod si fecerit, et super hoc convincatur, respondeat domino de damno per hujusmodi servientem sibi illato, secundum quod per patriam verificare poterit, et habeat [dominus] suum recuperare, per breve* (106) *de debito [versus custodem]. Et si custos gaolæ non habeat per quod justicietur, vel unde solvat, respondeat superior suus* (107), *qui custodiam hujusmodi gaolæ sibi commisit, per idem breve* (108).

(104) This act extends to all keepers of gaols, as well by wrong or *de facto*, as *de jure*. 2 Inst. 382.

(105) This assent may be by parol, and shall be a sufficient bar in an action of debt brought for the escape. 2 Inst. 382.

(106) Although this statute and the subsequent stat. 1 R. 2. c. 12. only mentions “per breve,” yet a bill of debt lies also by the equity of these statutes. 2 Inst. 382.

(107) When a person, having the custody of a gaol of freehold or inheritance, commits the same to another, who is not sufficient, the superior shall answer for the escape of the prisoner. The mayor and citizens of London having the shrievalty of London in

The next statute on this subject is stat. 1 R. 2. c. 12. by which it is ordained, "that no warden of the Fleet shall
 " suffer any prisoner there being, by judgment at the suit
 " of the party, to go out of prison by mainprise, bail, nor
 " by baston, without making agree to the said parties of
 " that whereof they were judged, unless it be by writ or
 " other commandment of the king, upon pain to lose his
 " office, and the keeping of the said prison. And if any
 " such warden be attainted by due process, that he has
 " suffered or let such prisoner to go at large against this or-
 " dinance, then the plaintiffs shall have their recovery
 " against the warden, by writ of debt."

Though this statute is confined in terms to the wardens of the Fleet^a, yet it has been holden that sheriffs and other gaolers are within the equity of it.

On the preceding statutes, extended by a liberal construction, the action of debt against sheriffs and other gaolers, for original escapes out of execution, is wholly founded. It is observable, however, that these statutes being in affirmance of the common law, have not taken away the common law remedy by action on the case; and that it is at the election of the party to bring either the one or the other^b (109). There are, however, some advantages attend-

^a Plowd. 35 b.

^b Burton v. Eyre, Cro. Jac: 289.

fee, and the sheriffs of London being guardians under them, and removeable from year to year, the mayor and citizens are the superiors; and, although the sheriffs appoint a keeper under them, yet he is not within the statute; for there cannot be two superiors within this act, but one superior and one inferior only. 2 Inst. 382. In *Plummer v. Whitchcott*, 2 Lev. 158. 2 Mod. 119. T. Jones, 60. S. C. the court were of opinion, that the warden of the Fleet in fee, having granted the office to A. for life, who permitted a prisoner in execution to escape, was responsible, A. not being sufficient at the time of action brought.

(108) It was said arg. in *Plummer v. Whitchcott*, 2 Lev. 159. that after this statute, and before the stat. 1 R. 2. c. 12., actions of debt were brought in other cases besides Account and 16 E. 3. Fitz. Dam. 81. Mich. 41 E. 3. pl. 1. 41 Ass. Bro. Escape, 28. were cited. And by Buller J. in *Bonafous v. Walker*, 2 T. R. 132. it was said, that this statute (13 Edw. 1. c. 11.) by a liberal construction had been holden to extend to all cases.

(109) An action on the case is the only remedy against the sheriff for the escape of prisoners who have been arrested on mesne process; the statutes 13 Edw. 1. c. 11. and 1 R. 2. c. 12. being confined to escapes out of execution.

ing the remedy given by statute, which make it more eligible than proceeding by the common law: First, the action of debt for an escape^c, being founded on a debt created by law, without any lending or contract, is not within the statute of limitations, (21 Jac. 1. c. 16. s. 3.) which is confined to "actions of debt grounded upon a lending or contract, without specialty, and actions of debt for arrears of rent," whereas an action on the case for an escape falls within the general words, "all actions on the case," in that statute, and consequently must be brought within six years next after the cause of action: Secondly, when an action on the case is brought for an escape, the jury are at liberty to give such damages as they shall think right under all the circumstances of the case, and a small sum is frequently considered as sufficient in cases of great hardship against the gaoler. But where a prisoner escapes out of execution^d, and the remedy prescribed by the statute 13 Edw. 1. c. 11. and 1 Ric. 2. c. 12. is adopted, the gaoler is put in the same situation in which the original debtor stood, and the jury cannot give a less sum than the creditor would have recovered against the prisoner; namely, the sum endorsed on the writ, and the legal fees of execution.

Such is the law relating to original escapes out of execution; and by stat. 1 Ann. stat. 2. c. 6. s. 2. the same remedy is given against sheriffs, who permit the escape of persons who have been retaken on an escape warrant authorized by the first section of that act.

What shall be deemed an Escape.—Let us next inquire in what cases an action of debt for an escape may be maintained. Escapes are either voluntary or negligent. *Voluntary* escapes are such as are by the express consent of the gaoler (110); *negligent*, where the prisoner escapes without the consent or knowledge of the gaoler^e. In either of these cases an action of debt may be maintained against the gaoler. Even circumstances of the escape having been without any default on the part of the gaoler, will not afford him any justification^f: the act of God alone, or that of the king's enemies, will be an excuse. If a defendant taken in execution

c Jones v. Pope, 1 Saund. 34.

d Bonafous v. Walker, 2 T. R. 126.

e Stonehouse v. Mullins, Str. 873.

f Alsept v. Eyles, 2 H. Bl. 108.

(110) "If a gaoler retakes a prisoner *in execution* after a voluntary escape, he is liable to an action of false imprisonment." 3 Rep. 52. b. and per Grose J. in Atkinson v. Matteson, 2 T. R. 177.

be afterwards seen at large, for any the shortest time, even before the return of the writ, the sheriff will be chargeable for an escape (111); for it is his duty to obey the writ^g, and the writ commands him to take the defendant, and him safely keep, so that he may have him ready to satisfy the plaintiff.

A sheriff's officer having, on the 27th of September^h, arrested a person, under a writ of *ca. sa.* returnable on the 7th of November following, carried him to a lock-up-house; and on the 2d of October permitted him to go in company with one of his (the officer's) followers, to his own house, for the purpose of settling his affairs; the day after, the prisoner was seen riding with the officer: it was adjudged, that the sheriff was liable for an escape; for the custody of the follower, after the writ had been once executed, amounted to nothing; and further, what was done by the follower was not done in execution of the writ (112).

Upon a *habeas corpus* to a gaoler, to bring a prisoner in execution before the court, the gaoler shall have a convenient time only for that purpose, and for carrying him back again to prisonⁱ; which, if he exceeds, it is an escape.

The sheriff is liable for the escape of a prisoner taken in execution on an erroneous judgment^k. So though there be error in the process, the sheriff cannot take advantage of it^l.

g *Hawkins v. Plomer*, 2 Bl. R. 1048. k *Gold v. Strode*, Carth. 148.
 h *Benton v. Sutton*, 1 Bos. & Pul. 24. l *Burton v. Eyre*, Cro. Jac. 289.
 i Resolved by all the judges, Cro. Car. 14. (113).

(111) After an arrest on mesne process the gaoler may suffer the prisoner to go at large, provided he has him at the return of the writ. *Atkinson v. Matteson*, 2 T. R. 172. Hence in *Noy*, 72. a distinction is taken that in actions for escape on mesne process, the writ shall allege, that *ad largum ire permisit et non compervit ad diem*; but on process of execution *ad largum ire permisit* is sufficient. And so are the precedents, *Rastal*. 171.

(112) Process of execution being to operate immediately by duress of imprisonment, the party ought to be taken to prison within a convenient time. 1 Bos. & Pul. 27, 8.

(113) At the conclusion of the resolutions on this point, (Cro. Car. 14.) the judges admonished the warden of the Fleet, that under colour of writs of *habeas corpus* he should not suffer prisoners to go at large upon peril to be charged with escapes. See also *Hob.* 202. *Hard.* 476. Where a prisoner is removed by *habeas corpus*, if the officer take him out of the direct road, it is an escape. Per Buller J. in *Benton v. Sutton*, 1 Bos. & Pul. 28.

So debt lies for an escape against the sheriff, who permits a prisoner taken under a *ca. sa.* to go at large, although the sheriff returns not the writ^m; for there is a record of which the party shall take advantage, though the writ be not returned.

If a sheriff arrests a party under a *ca. sa.* who then pays the debt and costs, whereupon the sheriff permits him to go at large, the sheriff is guilty of an escape for which debt will lie; at least, where the sheriff retains the money, and does not pay it over immediately to the plaintiff; for it is the duty of the sheriff to *have the body* to satisfy the plaintiff, and not to receive the moneyⁿ. The court, however, in this case, intimated a strong opinion, that if the sheriff had, immediately upon the receipt of the money, paid it over to the plaintiff, they would have exonerated the sheriff.

Where the defendant is arrested on a *ca. sa.* issued upon a judgment^o, without a *scire facias*, after the year, and the sheriff permits him to escape, debt will lie against the sheriff for the escape; for though the process be erroneously awarded, yet it is sufficient for the arrest by the sheriff; and he might have justified in an action for false imprisonment, and therefore cannot set the prisoner at large. So where the writ of execution is returnable the term next but one after the teste^p, instead of the next term; the sheriff may be charged for an escape; because the writ, though erroneous, is not void, the party not having a day on such writ. So where a court not having jurisdiction, orders an officer to discharge a prisoner, and the officer obeys the order, he is liable in an action for an escape.

The stat. 37 Geo. 3. c. 112. authorized justices of the peace^q, "at the first or second general quarter session, or general session, to be holden after the passing the act, or some adjournment *thereof*, to discharge insolvent debtors under certain circumstances." The justices in the county of S. "at a general quarter session holden by adjournment," after the passing the act, but which appeared to have been an adjournment of a session holden before the act, ordered the gaoler of the sheriff's goal to discharge an insolvent, who was in the custody of the sheriff in execution. It was holden, that this adjourned session, not being an original

^m Clifton's Case, cited by Periam, p Shirley v. Wright, Lord Raym. 775. Cro. Eliz. 17. Salk. 700. S. C.

ⁿ Slackford v. Austen, B. R. M. 52 G. 3. MS. ^q Brown v. Compton, 8 T. R. 424. in which Orby v. Hales, 1 Lord Raym. 3. was overruled.

^o Bushe's Case, Cro. Eliz. 188.

Session holden after the passing of the act, nor an adjournment of such a session, had not any jurisdiction under this act; and, as the court of general session, or general quarter session had not, independently of this act, any authority over a person charged in execution in a civil suit, the proceeding was *coram non judice*, and consequently, the sheriff, being responsible for the act of his servant, was liable to the party, at whose suit the insolvent was in custody, for the escape; agreeably to the rule laid down, in the case of the Marshalsea, 10 Rep. 76. a. that, when the court has not jurisdiction of the cause, the whole proceeding is *coram non judice*, and an action lies against the officer, who executes the process of the court.

By stat. 8 and 9 W. 3. c. 27. s. 1. "Prisoners upon contempt or mesne process, or in execution, committed to the custody of the marshal of the king's bench, or warden of the fleet, shall be detained within the said prisons, or the rules thereof (114), until discharged by due course of law; and if the marshal, or warden, or keeper of any prison, shall suffer any prisoner committed to their custody, either in mesne process or in execution, to go or be at large out of the rules of the prison (except by virtue of some writ of *habeas corpus*, or rule of court, to be granted only upon motion made or petition read in open court) such going or being at large shall be deemed an escape." And by section 8. "If the keeper of any prison, after one day's notice in writing, refuse to shew any prisoner committed in execution, to the creditor or his attorney, such refusal shall be deemed an escape." And by s. 9. "If any person desiring to charge another with any action or execution, shall desire to be informed by the

(114) By this statute, the rules are to all intents and purposes the same as the walls of the prison. A defendant in execution, who had the liberty of the rules of the Marshalsea Prison, upon his giving security to the marshal, was proved to have been out of the rules for several days, but on the marshal's hearing of the escape, was put in close custody before action brought for the escape; it was holden, that this was a negligent and not a voluntary escape; that the escape was not voluntary unless it was with the consent or by the default of the marshal, and his allowing the rules of the prison was not any default in him, for the law had given a sanction to it; and it could not be inferred thence, that he consented to the prisoner's escape; because he had taken security that the prisoner should not go beyond the rules, and immediately on his return the marshal had confined him in close custody. *Bonafous v. Walker*, 2 T. R. 126.

“ keeper of the prison, whether such person be a prisoner
 “ or not, the keeper shall give a true note, in writing,
 “ thereof, to such person, upon demand, at his office for
 “ that purpose, upon pain of forfeiting 50*l.* and such note
 “ shall be sufficient evidence that such person was at that
 “ time a prisoner in actual custody.”

In an action for an escape against the marshal, it appeared that the prisoner, Serres^r, who was in execution in the marshal's custody, at the suit of the plaintiff, was seen at large about eleven o'clock, on the first day of *Michaelmas* term 1806. The defence was, that Serres was out upon a day-rule, granted by the court on the same day; and, by the preceding statute that could only have been granted at the sitting of the court, which, in fact, did not sit till after the time when he was at large. And, it further appeared, that the plaintiff had actually filed his bill against the marshal in this action before the sitting of the court on the same day. The petition, however, had been signed by the prisoner in the morning, before he went out of prison. The court were of opinion that the day-rule was a justification to the marshal for the liberation of the prisoner on the whole of the day, by relation; Lord Ellenborough C. J. observing, that it would entirely frustrate the benefit of the day-rule to the parties, if the court were to construe it thus narrowly and strictly; for, if it were first to be moved, and then to be drawn up, and afterwards served upon the marshal, before the party could avail himself of it, he would have the benefit of a very small portion of the day, considering how late the court usually commenced their sittings on the first day of term. The court would consider, however, that the rule was only granted, as legally it could only have been, when the court sat on the first day; but, when granted, it was a liberty for that day, and covered the antecedent part of the day; because, generally speaking, there is no fraction of a day, unless where it is necessary to look to it in order to answer the purposes of justice.

Of Recaption.—If the party in execution escapes *by the negligence* of the gaoler, he may be retaken either by the gaoler^r or the plaintiff^t; or if the plaintiff recovers against the sheriff for the escape, the sheriff may bring an action on the case against the defendant for damages sustained by him, by reason of the escape^u: but if he escape *by the assent of the*

^r Field v. Jones, 10 East, 151.
^u F. N. B. 130.

^t Agreed by the court in Allanson v. Butler, 1 Sidf. 330.
^u F. N. B. 130.

gaoler, the gaoler cannot retake him^x; neither in such case can the gaoler, if he is obliged to pay the creditor the amount of his debt in consequence of the escape, recover back the money from the debtor^y; yet as the judgment remains still in force, the plaintiff may either bring debt^z or *scire facias*^a on the judgment, or sue out another writ of *capias ad satisfaciendum*^b, or of *fieri facias*^c; and, if the plaintiff die, his personal representative may have a *scire facias*^d.

If a prisoner in execution has been permitted to go at large, with the consent of *the plaintiff*, he can never resort to the judgment again for the purpose of enforcing it in any manner. And this rule holds, although the party in execution has been discharged on terms which are not afterwards complied with; as upon an undertaking to pay the debt by instalments^e; or to render himself on a given day if he did not in the mean time pay the debt^f; or to pay the debt at a future time^g, and on failure thereof, that he should be liable to be taken in execution again^h. So if the plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.*, the plaintiff cannot afterwards take any of the other defendantsⁱ (115). So where the prisoner was discharged upon giving a fresh security to satisfy the judgment, which was afterwards defeated, on account of a mere informality; it was holden, that the judgment was satisfied and could not be set off against a demand of the prisoner^k.

In conformity with this rule, it was holden, that an agreement, by the defendant^l, on his being discharged out of custody with the plaintiff's consent, that the judgment should stand revived for twelve months, was null and void. So where a bond was conditioned for the surrender of a debtor who had been discharged out of execution^m, with

x *Fetherstonhaugh v. Atkinson*, Barnes, 379. Adm. in *Atkinson v. Jameson*, 5 T. R. 25.

y *Pitcher v. Bailey*, 8 East, 171.

z *Buxton v. Home*, 1 Show. 174.

a *Allanson v. Butler*, 1 Lev. 211. *Allen v. Vinter*, T. Jones, 21.

b 1 Vent. 4.

c *Basset v. Salter*, 2 Mod. 136.

d *Sudall v. Wytham*, 2 Lutw. 1264.

e *Vigers v. Aldrich*, 4 Burr. 2482.

f *Clarke v. Clement*, 6 T. R. 525.

g *Tanner v. Hague*, 7 T. R. 420.

h *Blackburn v. Stupart*, 2 East, 243. i 6 T. R. 525.

k *Jaques v. Withy*, 1 T. R. 557.

l *Thompson v. Bristow*, Barnes, 205.

m *Da Costa v. Davies*, 1 Bos. & Pul. 242.

(115) But a discharge by act of law, as under an insolvent debtor's act, of one of several defendants taken on a joint *ca. sa.* has been holden not to operate as a discharge of the other defendants. *Nadin v. Battie*, 5 East, 147.

the creditor's consent, on a certain day, so that the debtor might be again taken in execution, the condition was holden void.

The ground on which these decisions proceed, being, that the judgment is *satisfied* by the discharge of the prisoner (once in execution) with the consent of the creditor, the creditor loses the whole benefit of his judgment, and is deprived of *every* remedy upon it, as well by action of debtⁿ, or writ of execution against the goods', as by writ of execution against the person.

Such are the provisions of the common law: but, for the relief of debtors in execution for small debts, it has been enacted, by stat. 48 Geo. 3. c. 123. " that all persons in execution, upon any judgment obtained in any court, whether such court be or be not a court of record, for any debt or damages not exceeding twenty pounds, exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged, may, upon application in term time to one of his Majesty's superior courts of record at Westminster, to the satisfaction of such court, be forthwith discharged out of custody, as to such execution by rule of court: provided, 1. That in case of any such application being made to be discharged out of execution upon a judgment obtained in any of his Majesty's superior courts of record at Westminster, such application shall be made to such one of those courts only, wherein such judgment shall have been obtained, and that whether the person so in execution shall then be actually detained in the gaol or prison of the same court, or shall then stand committed on *habeas corpus* to the gaol or prison of another court. 2. If any such discharge shall have been unduly or fraudulently obtained upon any false allegation of circumstances, which, if true, might have entitled the prisoner to be discharged by virtue of this act, such prisoner shall, upon the same being made appear to the satisfaction of the court, by whose order the said prisoner had been discharged, be liable to be again taken in execution and remanded to his former custody by rule of the same court: provided also, that no sheriff, gaoler, or other person, shall be liable as for the escape of any such prisoner, in respect of his enlargement during such time as he shall have been at large, by means of such undue discharge. 3. That not-

ⁿ *Vigers v. Aldrich*, 4 Burr. 9482.

^o *Tanner v. Hague*, 7 T. R. 420.

“ withstanding the discharge of any debtor by virtue of this
 “ act, the judgment shall remain in force to all purposes, ex-
 “ cept as to the taking in execution the person of such
 “ debtor: and that the creditor, at whose suit such debtor
 “ was so taken or charged in execution, may take out all
 “ such execution on every such judgment against the lands,
 “ goods, and chattels, of any such debtor (other than the
 “ necessary wearing apparel and bedding of him and his
 “ family, and the necessary tools for his trade or occupation,
 “ not exceeding the value of ten pounds in the whole); or
 “ bring any such action on any such judgment against
 “ such debtor respectively; or bring any such action, or
 “ use any such remedy, for the recovery and satisfaction of
 “ his demand, against any other person or persons liable to
 “ satisfy the same, in the same manner (but in the same
 “ manner only) as such creditor otherwise might have done,
 “ in case such debtor had never been taken or charged in
 “ execution upon such judgment: provided that no debtor,
 “ duly discharged in pursuance of this act, shall at any
 “ time afterwards be taken or charged in execution upon
 “ any judgment herein so as before declared to remain in
 “ force, nor be arrested in any action to be brought on any
 “ such judgment, and that no proceeding by *scire facias*,
 “ action, or otherwise, shall be had against the bail in any
 “ action upon the judgment, wherein the defendant shall
 “ have been charged in execution, and afterwards discharged
 “ by virtue of the provisions of this act.”

If a prisoner in execution^p be discharged by the order of a court not having jurisdiction, the creditor may retake him on an escape warrant.

By stat. 8 & 9 W. 3. c. 27. s. 7. “ If a prisoner committed
 “ in execution shall escape thence, by any ways or means,
 “ the creditor, at whose suit such prisoner was charged in
 “ execution, at the time of his escape, may retake him by
 “ any new *capias* or *capias ad satisfaciendum*, or sue forth
 “ any kind of execution on the judgment, as if he had never
 “ been in execution.”

By whom the Action for an Escape may be brought.—If a writ of execution be delivered to the sheriff against A., at the suit of B., and a warrant made out thereon, and before the return of such writ A. is taken in execution, at the suit of C., and then escapes^q, B. may maintain debt against the

^p Anon. Salk. 273. recognised by Lawrence J. in *Brown v. Compton*, 8 T. R. 424.

^q *Benton v. Sutton*, 1 Bos. & Pul. 24.

sheriff for the escape, although the party was not arrested under the writ at the suit of B. (116).

So where A. levied a plaint in the sheriff's court of London^r, against B., then in the Counter, in custody on a former plaint levied against him by C., and the sheriff permitted B. to escape; it was holden, that A. might bring an action for the escape; for, by entering the plaint, and charging the defendant in the Counter, he is in actual custody of the sheriff.

This action may be maintained by an executor for an escape out of execution in the time of the testator^r.

If the plaintiff, in an action against an hundred^t, is nonsuited, and judgment entered against him for the costs, upon which he is taken in execution, and the sheriff permits him to escape, the hundred may bring debt against the sheriff for the escape.

Against whom the Action for an Escape may be brought.—If husband and wife are taken in execution, and the wife is suffered to escape, although the husband continue in prison, yet an action will lie against the sheriff for this escape, in which action the whole debt shall be recoveredⁿ.

If the prisoner returns to prison after a voluntary escape^r, the plaintiff may admit him to be in execution; and if he be turned over to a new sheriff, &c. and afterwards escape, the plaintiff may bring an action against the new sheriff for such escape.

Where a new sheriff is appointed, his predecessor ought to deliver over (117) by indenture all the prisoners in his custody, charged^t with their respective executions; and if he omit any, it is an escape^r; but if a sheriff die, the new sheriff

^r Jackson v. Humphreys, Salk. 273.

^s Adm. by Holt. C. J. in Berwick v. Andrews, Ld. Raym. 971.

^t Hundred of Laurens v. —, Fitzg. 296.

ⁿ 1 Roll. Abr. 810. (F.) pl. 5.

^x James v. Pierce, 1 Ventr. 269. in which the case of a sheriff of Essex in Hob. 202. is denied to be law.

^y Adj. in Westby's case, 3 Rep. 71. b.

(116) If A. be in custody of the sheriff, at the suit of B., and a writ be delivered to the sheriff at the suit of C., the delivery of the writ is an arrest in law; and if A. escape, C. may bring debt against the sheriff for the escape. Salk. 274. cited in Bull. N. P. 66.

(117) An assignment of prisoners by an under-sheriff to the succeeding high-sheriff, (though not by indenture) is a good assignment. Poulter v. Greenwood, Barnes, 367. 4to. Ed.

action brought, otherwise it will be bad on demurrer^l (121); for if the party, at whose suit the prisoner was in execution, bring his action against the gaoler for an escape, and, after action brought, the gaoler retake him on fresh suit, this will not bar the action well attached before^m (122).

If the plaintiff in his declarationⁿ set forth, that the defendant *voluntarily* suffered J. S. (whom he had in execution) to escape, the defendant may plead that he retook him on fresh suit, before action brought, without traversing the voluntary escape (123); for this allegation in the declaration is immaterial. The proper place for setting it forth, if necessary, is in the replication.

If without the knowledge of the gaoler the defendant escapes^o, and returns before action brought, the gaoler may *plead* this in bar^p, for it is tantamount to a retaking on fresh pursuit before action brought. But in a plea of subsequent return, it is necessary to allege a detention, and that it continued to the time of action^q, or that it has been terminated by legal means.

Evidence.—To support this action the following proof will be necessary; first, an examined copy of the record of the judgment; 2dly, the writ of *capias ad satisfaciendum*; or in case the writ has been returned, an examined copy thereof, and of the return^r; 3dly, the delivery of the writ

l Stonehouse v. Mullins, Str. 873.
m Harvey v. Reynell, 1 Rol. Abr. 808,
9. (E.) pl. 2. W. Jones, 145. S. C.
n Bovy's case, 1 Vent. 211. 217. adj.
on demurrer.
o Chambers v. Gambier, Comyn's R.

554. S. P. Grey v. Gambier, Hil.
8 G. 2. Pr. Reg. C. B. 199.
p Bonafous v. Walker, 2 T. R. 126.
q Chambers v. Jones, 11 East, 406.
r See Tildar v. Sutton, Bull. N. P. 66.

(121) From a MS. note, it appears to have been a special demurrer, assigning for cause "that a recaption after action brought was not pleadable in bar."

(122) If the defendant escapes and fresh suit is made after him, and he dies before he is retaken, an action will lie, and the fresh suit is no excuse unless he be retaken, for he died at large out of gaol, Gilb. Execution. p. 85. Edn. 1763. cites Popham, 186; but the case there is put by counsel in argument, and does not appear to have been adjudged; the proposition, however, scarce requires an authority.

(123) Hence, under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape. Bonafous v. Walker, 2 T. R. 126. ruled on the authority of Bovy's case.

to the sheriff must be proved; and here it is to be observed, that, where the writ has been returned, the endorsement of such return on the writ^s, under the hand of the sheriff, will be sufficient evidence of the writ having been delivered to him. 4thly, A legal arrest under the writ must be proved; that is, an arrest either by the sheriff, or by the sheriff's officer, acting under the authority of a warrant duly signed and sealed by the sheriff. Regularly, in the latter case, the warrant ought to be proved; and for this purpose the plaintiff ought to subpoena the officer, and give him notice to produce the warrant, in which case, if it be not produced, a copy, or parol evidence of its contents, will be admissible. It will be proper, however, to remark, that this strict proof of the authority of the officer is not always required, for in one case^t the production of the writ, with the name of the officer endorsed, and proof of the usage in the sheriff's office to endorse on the writ the name of the officer to whom the warrant to arrest is delivered, coupled with evidence, that the person, whose name was endorsed, was the sheriff's officer, was holden sufficient, without the production of the warrant. In order to constitute a legal arrest by the officer, the arrest must be *by his authority*^u; but it is not necessary that he should be the hand that arrests, or that he should be in the presence of the person arrested, or actually in sight, or within any prescribed distance at the time of the arrest. Lastly, the escape must be proved by shewing, that the prisoner, after the arrest, was at large; whether before, or after the return of the writ is immaterial. The under-sheriff's confession of an escape will be evidence of the fact^x; because the under-sheriff gives the sheriff a bond to save him harmless, and therefore such confession goes in effect to charge himself. To prove a voluntary escape the party escaping may be a witness, because it is a thing of secresy, a private transaction between the prisoner and gaoler^y. Under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape^z.

Such is the evidence required to support this action in ordinary cases; but, where the circumstances under which the party has been arrested are of a more complicated nature, and the declaration more special, other proof will of

^s Blatch v. Archer, Cowp. 63.

^t M'Neil v. Archer, 1 Esp. N. P. C. 263. See also Blatch v. Archer, Cowp. 63.

^u Cowp. 63.

^x Yabesley v. Doble, Ld. Raym. 190.

See the remarks of Lawrence J. on this case in Drake v. Sykes, 7 T. R. 113.

^y R. v. Warden of the Fleet, Salk. MSS. Bull. N. P. 67.

^z Bonafous v. Walker, 2 T. R. 126.

course be necessary^a: as if the debtor, being in the county gaol, was charged with a writ of execution, by lodging it with the sheriff, it will be necessary to prove the fact of his so being in custody^b.

In debt for an escape^c, where the party, who had been taken in execution by the sheriff, was afterwards brought up by *habeas corpus*, and committed to the custody of the marshal of the King's Bench, the declaration alleged, that the prisoner was brought by *habeas corpus* before a judge of the King's Bench, and by him committed to the custody of the marshal, "as by the said writ of *habeas corpus*, and the said commitment thereon, now remaining in the said court, more fully appears." It was holden, that the production of the writ of *habeas corpus*, with the commitment of the judge endorsed thereon, but which appeared to have been brought from the office of the marshal, but *had not been filed of record in the court*, was not sufficient to support this allegation: for, admitting it not to be necessary, that the commitment should be of record, in order to entitle the plaintiff to the action, yet the plaintiff having averred a commitment of record, he was not at liberty to prove any other species of commitment; for the commitment, though matter of inducement, was material, and the latter part of the averment, "now remaining in the said court," was not capable of being separated from the former part, or treated as an immaterial or distinct averment (124).

If the plaintiff declare that he had J. S. and his wife in execution^d, and that the defendant suffered them to escape, and the jury find specially that the husband only was taken in execution, (it being a debt due from the wife before co-

^a Peake's Evid. 392.

^c Turner v. Eyles, 3 Bos. & Pul. 456.

^b See stat. 8 & 9 W. 3. c. 27. s. 9. ante, ^d Roberts v. Herbert, 1 Sidf. 5. p. 564.

(124) A different rule holds, where an action is brought for an escape after a commitment on a *habeas corpus*, of a person arrested on mesne process; there the "*prout patet per recordum* remaining in the court," may either be rejected as surplusage, on the ground of such commitments not being records, nor capable of becoming so; or, if considered as *quasi* of record, the allegation is sufficiently proved by the production of the writ, with the commitment annexed by the clerk of the papers of the King's Bench Prison, with whom, as servant of the marshal, such papers are usually deposited. Wigley v. Jones, 5 East, 440.

verture) and that he escaped, the plaintiff shall have judgment, for the substance of the issue is found (125).

If the defendant plead no escape^e, he cannot give in evidence no arrest, for the plea admits an arrest.

X. Of the Statutes, and general Rules relative to Actions founded on penal Statutes.

Of the time within which Actions on Penal Statutes must be brought.—By stat. 31 Eliz. c. 5. s. 5. “All actions brought for
 “ any forfeiture upon a penal statute, whereby the forfeiture
 “ is limited to the *king only*, shall be brought within two
 “ years next after the offence committed. And all actions
 “ brought for any forfeiture upon a penal statute, (except
 “ the statute of tillage) the benefit whereof is limited to
 “ *the king and the prosecutor*, shall be brought within one year
 “ after the offence committed; and, in default thereof, the
 “ same shall be brought for the king, at any time within
 “ two years after that year ended. And if any action shall
 “ be brought after the time before limited, the same shall
 “ be void. Provided^f, that, where a shorter time is limited
 “ by any penal statute, the action shall be brought within
 “ that time.”

It is to be observed^g, first, that this statute extends to all actions brought upon penal statutes, whereby the forfeiture is limited to the king, or to the king and the party, *whether made before or since the statute*. 2dly, If any offence prohibited by any penal statute be also an offence at common law, the prosecution of it as an offence at common law is not restrained by this statute. 3dly, The defendant

^e Bull. N. P. 67.
^f S. 6.

^g Tidd's Prac. 15.

(125) In debt for an escape against the marshal, it was alleged, that the prisoner was surrendered to him at the chief justice's chambers in the parish of St. Bride's, whereas it appeared upon evidence, that it was in the parish of St. Dunstan. But the judges held it well enough, this being debt, and the surrender [not the place of the surrender] being the only thing material, and that it differed from trespass, where every part of the declaration was descriptive. *Oates v. Machen*, Str. 595. at Nisi Prius, in Middlesex, coram Fortescue and Raymond, justices.

may take advantage of this statute, on the general issue, and need not plead it. 4thly, It is said, that the party grieved is not within this statute^h, but may sue as before (126).

On a case reservedⁱ, it appeared that an action of debt was brought on stat. 9 Ann. c. 14. by a common informer, against the defendant, for winning a sum of money of J. S. at cards. The money was lost and paid 11th March, 1757, and the original not sued out until Mich., 1762. The court of C. B. held it a case within stat. 31. Eliz.; for such action would have been within stat. 7 H. 8. c. 3.^k and the 31 Eliz. was made to narrow the time given by that statute, and therefore could never mean to leave any actions unrestrained in time: the latter part of the clause must therefore be construed to extend to them.

The suing out a *latitat* is a sufficient commencement of the suit to save the limitation of time, in an action for the penalty forfeited by the statute^l.

In actions brought on penal statutes, it is incumbent on the plaintiff to shew that the action was commenced within the limited time (127); in some cases this will appear by

^h Noy, 71. Tidd's Prac. 2d edit. 15.
ⁱ Lookup v. Sir T. Frederick, M.
 6 G. 3. Bull. N. P. 195.
^k Repealed by 31 Eliz. c. 5. s. 7.
^l Hardyman v. Whitaker, M. 22 G. 2.

B. R. 2 East's R. 574. n. Per Cur.
 recognizing the opinion of the three
 judges in Culliford v. Blandford,
 Carth. 233.

(126) See Buller's N. P. 105. S. P. who cites Carth. 232. and Ld. Raym. 78. The case there cited was this; an action *qui tam* was brought in B. R. by bill, on stat. 23 H. 6. c. 15. (by which a penalty of £40 is given to the king, and £40 to party grieved or common informer) by a common informer against a mayor for a false return of a burgess to serve in parliament; it appeared by the record, that the bill was not filed within a year after the offence committed. After judgment for the plaintiff in B. R., it was resolved, on error in the Exchequer Chamber, by the majority of the judges, that where the whole penalty is given to the informer, the stat. 31 Eliz. does not extend to it; because it is not within the words of the act, and penal acts are not extendible by equity. Culliford v. Blandford, Carth. 232. Ld. Raym. 78.

(127) So where a statute directs that an action shall not be brought until *after* a certain time, the plaintiff must shew that the action was not commenced until after the expiration of that time. By stat. 2 G. 2. c. 23. s. 23. it is enacted, "that an attorney shall not declare until a month after the delivery of his bill." In an action brought in C. B. by an attorney for the recovery of his fees, it appeared in evidence that the bill was delivered on the 30th Sep-

the *nisi prius* record, but where this does not appear, the plaintiff must be prepared to prove it by the production of the writ (128). In general, it will be sufficient for the plaintiff to shew that a writ, which will warrant the declaration, was sued out in proper time, without shewing such writ to have been served or returned^m (129). And this rule holds even where the declaration has not been filed within two terms (130) after the writ sued out, provided it was

^m *Parsons v. King*, 7 T. R. 6.

tember, 1797, and the record was entitled of Hil. Term, 1798. The plaintiff did not produce the writ, but relied on the production of the record. On the part of the defendant it was objected, that although a King's Bench record, in which the day is stated in the memorandum, might be taken as a good *prima facie* evidence at nisi prius of the time at which the action was commenced, yet a record in the court of common pleas could not; because, such record beginning with the placita of the term only, there was not any thing from which the day, on which the action was commenced, could be inferred. But the court of C. B. overruled the objection, Eyre C. J. observing, that the record was *prima facie* evidence of the action being properly commenced, and that it was incumbent on the defendant to disprove it by a copy of the writ. *Webb v. Pritchett*, 1 Bos. & Pul. 263.

(128) In debt on the stat. against usury, the plaintiff having proved the offence, it was objected, on the part of the defendant, that it did not appear by the record that the action was commenced within a year; and on the plaintiff's counsel then offering to produce the writ, it was contended, on the other side, that it was too late to give this evidence after the objection was made; and though that indulgence was allowed in a civil action, yet it was not proper or usual in a penal action. Lord Kenyon C. J. overruled the objection, being of opinion, that it was competent to the plaintiff to prove the commencement of the suit in any stage of the cause. *Maughan q. t. v. Walker*, Peake's N. P. C. 163.

(129) So when a writ is inducement only to the action, the taking out the writ may be proved without any copy of it, because possibly it might not be returned, and then it is no record; but where the writ itself is the gist of the action, a copy from the record must be produced agreeably to the rule; that the best evidence of which the nature of the thing is capable, must be adduced; and the writ cannot become the gist of the action until it is returned. *Gilb. Law of Evid.* ed. 1761. p. 21. *Bull. N. P.* 234. *Peake's Evid.* 2d edit. p. 50, 51.

(130) By the general rules of law, a plaintiff must declare against a defendant within 12 months after the return of the writ; but by

filed within a year after. But where two or more writs have issued, it must appear that the writ on which the plaintiff has declared, was a continuation of the first writ², which can be done only by shewing that the first writ was returned; for until the first writ is returned, the court is not in possession of the cause, so as to award an *alias* or *pluries*.

By stat. 21 Jac. 1. c. 4. s. 1. "All offences against any
 " penal statute, for which any common informer may
 " ground a popular action, bill, plaint, suit, or information,
 " before justices of assize, justices of *nisi prius* or gaol deli-
 " very, justices of *oyer* and *terminer*, or justices of peace
 " in their general or quarter sessions, shall be commenced,
 " sued, prosecuted, tried, recovered, and determined, by
 " way of action, plaint, bill, information, or indictment,
 " before the justices of assize, &c. of every county, city,
 " &c., having power to determine the same, wherein such
 " offences shall be committed, in any of the courts, &c.
 " aforesaid respectively; and the like process shall be as
 " in actions of trespass *vi et armis* at common law; and all
 " informations, actions, bills, plaints, and suits, commenced,
 " sued, &c., by the attorney general, or other officer, or
 " common informer, in any of the king's courts at West-
 " minster, for any of the said offences, penalties, or for-
 " feitures, shall be void." And by s. 2. "The offence shall
 " be alleged to have been committed in the county where
 " such offence was in truth committed; and if, on the ge-
 " neral issue, the plaintiff or informer shall not prove the
 " offence, *and that the same was committed in the county in*
 " *which it is laid*, the defendant shall be found not guilty."
 By the 3d section it is enacted, "that no officer in any
 " court of record, shall receive, file, or enter of record, any
 " information, bill, &c. grounded upon a penal statute, un-
 " til the informer has first taken an oath, which shall be en-
 " tered of record, before some of the judges of the court,
 " that the offence was not committed in any other county,

n Harris q. 1. v. Woolford, 6 T. R. 617.

the rules of the court of B. R., if the plaintiff does not deliver his declaration within two terms after such return, the defendant may sign judgment of *non pros*. If, however, the defendant omits to sign such judgment, the plaintiff may deliver his declaration at any time within the year. *Worley v. Lee*, 2 T. R. 112. *Penny v. Harvey*, 3 T. R. 123. *Sherson v. Hughes*, 5 T. R. 35.

“ than where, by the said information, bill, &c. the same is
 “ supposed to have been committed, and that he believes
 “ in his conscience, that the offence was committed within
 “ a year before the information or suit, within the same
 “ county.” By the 4th section, defendants are permitted
 to plead the general issue, not guilty, or *nil debet*, and give
 the special matter in evidence. By the 5th section, several
 statutes now obsolete, e. g. the statute against popish recu-
 sants, and actions for maintenance, &c. are exempted from
 the operation of this act.

With respect to this statute, it is to be observed, 1st,
 That it does not extend to subsequent penal laws^o; conse-
 quently, in an action founded on stat. 12 Ann. c. 16. against
 usury, it is not necessary that there should be an affidavit
 that the offence was committed in the county where, and
 within a year before, the action was brought^p (131). 2dly,

- Hicks's case, Salk. 373. R. v. Galle, Robson, cited in Garland v. Burton,
 Salk. 372. Ld. Raym. 370. Harris Andr. 292.
 q. t. v. Renny, cited in French q. t. p French v. Coxon, Str. 1081.
 v. Coxon, Str. 1081. Messenger v.

(131) An opinion, however, seems to have prevailed, that, where
 a subsequent statute gives a popular action, the venue must be
 laid in the proper county within the equity of 21 Jac. 1. c. 4. The
 only authority, of which I am aware, for this position, is a dictum
 of Holt C. J. in Hicks's case, Salk. 373. adopted in Bull. N. P.
 196. The following note of French q. t. v. Coxon, which is fuller
 than that in Strange, may tend to remove the doubts which have
 arisen on this point: This was an action brought against the de-
 fendant on the 12 A. st. 2. c. 16. against usury. A motion was
 made to stay the proceedings for irregularity, because there was
 not an affidavit annexed to the declaration, as is required by stat.
 21 Jac. 1. c. 4. s. 3. But for the plaintiff it was insisted, that the
 21 Jac. 1. did not extend to subsequent penal laws, and Harris q.
 t. v. Rayney, E. 7 G. 2. B. R. was cited, which was an action
 commenced on stat. 22 and 23 Car. 2. c. 19. for selling cattle alive,
 &c., and on motion to set aside the proceedings for want of an affi-
 davit, it was holden, that the stat. 21 Jac. 1. did not extend to sub-
 sequent penal laws. Per Lee C. J. In 1 Salk. 372, 3. it was so-
 lemnly determined, that the 21 Jac. 1. did not extend to subsequent
 penal laws: and that has prevailed ever since, whatever the private
 opinion of Holt then was. So that offences created by subsequent
 statutes must be governed by the directions therein given, as to
 the remedies upon them. And though an action brought on the
 st. 12 Ann. must be laid in the county where the offence was com-
 mitted, yet this is by the directions of that statute; and it has never

Wherever, by any act in force at the time when this statute passed, the informer might have sued by action, bill, plaint, suit, or information, in the inferior courts, as well as in the courts at Westminster, he is now confined to sue in the former; but as the statute does not give any new jurisdiction to the inferior courts^q, the party may still sue in the courts at Westminster, for all penalties, which could not, before the passing of that statute, have been recovered in the inferior courts. Hence, an informer may bring an action of debt in the courts at Westminster^r, on the stat. 1 Jac. c. 22 s. 14. for the recovery of the penalties for selling leather, which has not been searched and sealed; because this statute^s gives no jurisdiction to the inferior courts to distribute the penalties, but only to inquire of the premises; which inquiry means in their accustomed manner, namely, by indictment or presentment at common law. 3dly, This statute applies to those penal statutes only, on which proceedings may be had before the justices of assize, justices of the peace^t, &c.

By stat. 18 Eliz. c. 5. s. 1. (made perpetual by statute 27 Eliz. c. 10.) "Every informer, upon any penal statute, shall sue in proper person, or by his attorney." Hence an infant cannot be a common informer; for he must sue by *prochein amy* or guardian^u.

By the 3d section of stat. 18 Eliz. "No informer shall compound with any person that shall offend against any penal statute, for an offence committed, but after answer made in court to the suit, nor after answer, but by order or consent of the court" (132). This statute extends to

^q See *R. v. Galle*, Carth. 466. and *Garland q. t. v. Burton*, Str. 1103. Andr. 291. S. C.
^r *Shipman q. t. v. Henbest*, 4 T. R. 109. *R. v. Ferris*, H. 37 G. 3. Exch.
¹ *Wms. Saund.* 312. c. n. (1) S. P.

^s See s. 50.
^t *Leigh v. Kent*, 3 T. R. 362.
^u *Maggs v. Ellis*, M. 25 G. 2. B. R. Bull. N. P. 196. and MS.

been usual to annex an affidavit to the proceedings. Page, Probyn, and Chappel Js. of the same opinion. So the rule to set aside proceedings for irregularity was discharged, by the opinion of the whole court.

(132) The court will, on application being made, give the defendant liberty to pay the penalty into court with costs. *Walker v. King*, T. 31 G. 2. B. R. Bull. N. P. 197. and MSS. For the manner in which application to the court must be made, and at what time, see *Tidd's Pr.* 2d. ed. p. 470. 3d. ed. p. 560.

suits by common informers only^x, and not to those by party grieved; it extends, however, as it seems^y, to subsequent penal statutes, as well as to those which were in being when it was made.

A common informer cannot sue for a less penalty than the statute gives^z; if he do, though he have a verdict, judgment will be arrested: e. g. if a common informer were to sue for the single value of money won at play, the statute^a giving the treble value.

The exceptions in the enacting clause of the statute, which creates the offence, must be negatived by the plaintiff in his declaration^b; but, if there be a subsequent exemption, that is matter of defence, and the other party must shew it to exempt himself from the penalty.

Of the Pleas to Actions founded on penal Statutes.—To an action founded on a penal statute, not guilty, or *nil debet*, are good pleas^c. A saving proviso may be given in evidence on the general issue; because, if the party is within the proviso, he is not guilty, on the body of the act on which the action is founded; but another statute, whereby the defendant is exempted or discharged from the penalty, must be pleaded, and cannot be given in evidence on the general issue^d. So a recovery in another action for the same offence, cannot be given in evidence on *nil debet*^e, but must be pleaded specially, in order to give the plaintiff an opportunity of replying *nul tiel record*, or that it was a fraudulent recovery; and in pleading this plea, care must be taken to set forth that the plaintiff in the other action had priority of suit; otherwise the plea will be bad on demurrer^f.

To this plea of a prior recovery^g, the plaintiff may reply that the recovery was had by covin; and if the covin be found, the plaintiff shall recover, and the defendant shall be imprisoned for two years.

No release of any common person shall be available to discharge a popular action. The defendant cannot plead several matters to an action on a penal statute^h; because the

x Doghead's case, 2 Leon. 116. 2 Hawk. P. C. 279. See also s. 6. of the statute.

y Pie's case, Hutt. 35.

z Cunningham v. Bennet, T. 1 G. 1. C. B. Bul. N. P. 196.

a 9 Ann. c. 14.

b Spieres v. Parker, 1 T. R. 141.

c Bull. N. P. 197. cites Hob. 218.

d Gilb. Evid. 6.

e Bredon q. t. v. Harman, E. 12 G. 2: C. B. London sittings, Eyre C. J. Str. 701.

f Jackson v. Gisling, T. 15 G. 2. Bull. N. P. 197.

g Stat. 4 H. 7. c. 20.

h Heyrick v. Foster, 4 T. R. 701.

stat. 4 Ann. c. 16. (which¹ enables defendants to plead several matters) contains a proviso that nothing in the said act shall extend to actions on any penal statute.

By stat. 27 G. 3. c. 29. a parishioner is a competent witness to prove an offence within the parish, although the penalty or part thereof is given to the poor of the parish, provided the penalty or penalties to be recovered do not exceed 20*l*.

Of the Venire.—By stat. 24 G. 2. c. 18. s. 3. (reciting that by stat. 4 Ann. c. 16. s. 6. it was enacted, that every *venire facias* for the trial of any issue in any action or suit, in the king's courts of record at Westminster, should be awarded out of the body of the county, but with a proviso² that nothing in the said act should extend to any action or information upon any penal statute, and that such proviso had been found inconvenient,) it is enacted, that every *venire facias* for the trial of any issue in any action or information upon any penal statute, in the king's courts of record at Westminster, in the counties palatine of Lancaster, Chester, and Durham, and Wales, shall be awarded of the body of the proper county where such issue is triable.

The proviso in the stat. 16 & 17 Car. 2. c. 8. s. 2. that this act shall not extend¹ to any action or information on any penal statute, must be understood of popular actions and informations, and not of remedies given by statute to the parties grieved.

In an action on a penal statute^m, it was moved by the defendant that the plaintiff should give security to pay the costs, upon affidavit that he was a poor man. But the court refused the motion; for the statute having given him power to sue, it is a debt due to him; but if it appeared that the action was brought in a feigned name, they would oblige the real prosecutor to give security.

The court will grant a new trial, after verdict for defendant, in a penal action, *on account of a mistake or misdirection of the judgeⁿ*; but where the case is properly left to a jury, although they should draw a wrong conclusion, the court will incline against disturbing the verdict.

ⁱ See s. 4.

^k See the 7th section of 4 Ann. c. 16.

^l Sewel v. Edmonton Hundred, E. 7 G. 1. C. B. Bull. N. P. 197.

^m *Shinley v. Roberts*, Bull. N. P. 196, 7.

ⁿ *Wilson v. Rastall*, 4 T. R. 753. *Craft v. Gibbs*, 5 T. R. 19. S. P.

XI. Debt on Stat. 2 G. 2. c. 24.—Bribery at Elections—Provisions of the Statute—Stat. 49 G. 3. c. 118.—Declaration—Evidence—Stat. 7 & 8 W. 3. c. 4. Treating Act.

WHEREVER a person is bound by law to act without any view to his own private emolument, and another, by a corrupt contract, engages such person, on condition of the payment or promise of money, or other lucrative consideration, to act in a manner which he shall prescribe, both parties are, by such contract, guilty of bribery°.

There are not any traces either of action or prosecution for bribery in elections of members of parliament, in the annals of Westminster-hall^p, until after the legislature inflicted particular penalties for this kind of bribery by stat. 2 G. 2. c. 24.

Informations for this offence were not granted until about the time of the general election in 1754; and the first case in which an information at common law, for this offence, was prosecuted with effect, was the case of *R. v. Pitt*, T. 2 G. 3. B. R. 3 Burr. 1335. 1 Bl. R. 380. S. C. (133). From

o 2 Doug. Controv. Elections, 400.

p Ib.

(133) In this case, the defendant having been convicted and brought up for judgment, a doubt was raised as to the judgment which the court could or ought to give; the time limited for prosecution, by stat. 2 G. 2. c. 24. s. 11. (viz. two years) not having expired. The court (after consideration) ordered the defendant to be imprisoned for a short term, observing, that in inflicting this punishment they had paid regard to the circumstance of the limited time for prosecuting upon the statute not being expired.

The definitions on the subject of bribery in Sir E. Coke, Hawkins, and other writers, on the pleas of the crown, extend to the corruption of persons in judicial offices only. Mr. Douglas ascribes the silence of these writers on the subject of bribery at elections of members of parliament, to fear on the part of the judges (at the time when this species of bribery first prevailed) that by exercising a jurisdiction over this offence, they should invade the privileges and judicial powers of the House of Commons. It was, however, remarked by Lord Mansfield C. J. delivering the opinion of the court in *R. v. Pitt*, 1 Bl. R. 383. that bribery at elections,

the nature of this work, the following remarks will necessarily be confined to stat. 2 G. 2. c. 24.

By the 7th section of this statute^q, it is enacted, "That if
 " any person having or claiming to have a right to vote in
 " the election of any member or members to serve for the
 " commons in parliament, shall ask, receive, or take any
 " money, or other reward, by way of gift, loan, or other de-
 " vice; or agree or contract for any money, gift, office,
 " employment, or other reward, to give his vote, or to re-
 " fuse or to forbear to give his vote, in any such election,
 " or if any person by himself, or any person employed by
 " him, shall, by any gift or reward, or by any promise,
 " agreement, or security for any gift or reward, corrupt or
 " procure any person to give or to forbear to give his vote
 " in any such election, such person shall for every offence
 " forfeit the sum of 500*l.*, to be recovered, with costs, by
 " action of debt in any of the king's courts of record at
 " Westminster."

By s. 8. "If any person offending against this act shall,
 " within twelve months next after the election, discover
 " any other offender, so that he be thereupon convicted,
 " the discoverer (not having been before that time con-
 " victed of any offence against this act) shall be indemni-
 " fied and discharged from all penalties and disabilities
 " which he shall then have incurred by any offence against
 " this act (134)".

^q Stat. 2 G. 2. c. 24. s. 7.

taken generally, was and still is punishable at common law; that the statute itself (2 G. 2. c. 24. s. 7.) supposed it to remain punishable at common law by the words, "or any otherwise lawfully convicted." But it did not follow of course, that the court was obliged, *ex debito justitiæ*, to grant informations for bribery at elections of members, since the stat. 2 G. 2. which inflicts such very severe penalties. He added, that whether the court would ever hereafter grant informations for this offence until the time of limitation was expired, would be matter of future consideration. In *R. v. Heydon*, E. 3 G. 3. B. R. 3 Burr. 1387. 1 Bl. R. 404. S. C. the judgment was respited until the limited time was expired, and then the court imposed a fine upon the defendant, and ordered him to be imprisoned.

(134) A verdict having been found at the assizes against the defendant, upon the 7th section of this statute, for corrupting certain voters; the defendant at the beginning of the term next following the assizes, moved, that judgment upon the postea might be stayed, on the ground of his having entitled himself to the benefit

If a person give or promise money or other reward to a voter, in order to procure his vote for one candidate, although the voter afterwards vote for another candidate, the penalties of the statute are incurred by the corrupter.

In an action of debt on this statute, the declaration charged, that the defendant corrupted one M. to vote for Lord V. and Sir R. B., (two of the candidates) by giving him a sum of money. The fact was, that M. did not vote for Lord V. and Sir R. B., but for their opponents; whereupon it was objected, that the defendant, as he did not by any corrupt agreement procure M. to vote for Lord V. and Sir R. B. could not be said to have corrupted him so to do; but the court overruled the objection, on the authority of *Bush v. Rawlins* (135), observing, that the offence was completely committed by the corrupter, whether the party bribed should afterwards perform his promise or break it (136).

To an action of debt on the statute, the defendant pleaded *nil debet*: After verdict for the plaintiff, the defendant applied to the court to stay further proceedings. The grounds of the application will appear from a statement of the case, which was as follows: The defendant, on the 16th of March, had received a bribe from one Earle; and on the same day made a discovery of Earle to J. S. (an attorney and commissioner to take affidavits) accompanied with an affidavit of the fact; whereupon an action was brought by one Bingley against Earle, and he was served with the writ in that action on the 19th of March. Two months afterwards the present action was commenced, and the defendant was served with process therein on the 18th of May. The two causes of *Bingley v. Earle* and *Sutton v. Bishop* were set

r *Sutton v. Norton*, 3 Burr. 1235. s *Sutton v. Bishop*, 4 Burr. 2282.

of the 8th section, by having made a discovery of another person offending against the statute, who had been convicted thereof on his (the defendant's) evidence; but the court rejected the application, observing, that this was not a case wherein they ought to interpose at all upon motion. *Pugh v. Curgenven*, 3 Wils. 35.

(135) In which case it was resolved, that the giving a bribe to a person to forbear voting was an offence, although such person did not forbear to vote, but actually voted for the opposite candidate. See the case in Sayer's Rep. 289. by the name of *Bush v. Ralling*.

(136) See remarks on this case in Simeon's *Law of Elections*, 2d edit. p. 207, 208.

down for trial, at the assizes, on the same day; but, the cause of Sutton v. Bishop standing first, the judge would not invert the order, and try the cause of Bingley v. Earle first, although that action was commenced first. The consequence was, that Sutton obtained a verdict against Bishop. Bingley, on the other hand, had a verdict against Earle, upon the evidence of Bishop; but this verdict came too late for Bishop to avail himself of it at the trial, for a verdict had already been given against him. The court were of opinion, that, under the circumstances of this case, Bishop was to be deemed a discoverer, within the meaning of the 8th section; for it was not intended that the discoverer should be plaintiff in the cause wherein the discovery was made; because, if no other witness, there could not be a verdict. It was agreed, however, by Yates, Aston, and Willes, Js. (137) that there could not be a new trial, the verdict being right; and that judgment could not be arrested, there not being error on the record. At all events, the party must proceed to enter up judgment in Bingley v. Earle, before any thing could be done by the court; for the term "convicted" did not mean convicted by verdict only, but by verdict followed up by judgment. At length it was resolved, that further proceedings should be staid by a special rule, stating the particular circumstances of the case (138).

The giving or promising money or office in order to procure the return of members, if not given to some person having a right, or claiming to have a right, to act as returning officer, or to vote at such election, not having been deemed bribery within the meaning of the preceding statute, such gifts being contrary to the freedom of elections, it was, by stat. 49 G. 3. (19th June, 1809,) c. 118., for the better securing the independence and purity of parliament, enacted and declared, that any person giving, or causing to be given, directly or indirectly, or agreeing to give any sum of money, gift, or reward, to any person, upon any agreement; that such person, to whom such gift or promise should be

(137) Lord Mansfield C. J. was attending the House of Lords in the Douglas cause.

(138) Similar difficulties arose in the case of Petrie v. White, 3 T. R. 5. and post. p. 588. where an application was made for relief, founded on the 11th section of this statute, the plaintiff having been guilty of wilful delay. The court on the authority of Sutton v. Bishop, stayed the proceedings by rule.

made, should, by himself, or by any other person at his solicitation or command, procure, or endeavour to procure, the return of any person to serve in parliament for any county, &c. or place, should, if not returned himself to parliament for such county, &c. for every such gift or promise, forfeit one thousand pounds; and the person so returned, and so having given, or so having promised to give, or knowing of and consenting to such gifts or promises, upon any such agreement, should be disabled and incapacitated to serve in that parliament for such county, &c. and deemed and taken to be no member of parliament, and enacted to be, to all intents and purposes, as if he had never been returned or elected; and any person receiving or accepting, by himself, or by any other person in trust for or to his use, any such sum of money, gift, or reward, or any such promise upon any such agreement, should forfeit to his majesty the value and amount of such sum of money, gift, or reward, over and above the sum of five hundred pounds.

The same section prescribes the mode of recovering the sums forfeited, with costs of suit, by action of debt, bill, plaint, or information, in any of the king's courts of record.

Of the Declaration.

The declaration on this statute sets forth, by way of inducement, the name of the county, city, or borough, where the election took place, and the number of members that it has been accustomed to send to parliament, specifying them as knights, citizens, or burgesses; it then proceeds to aver the issuing of the writ out of Chancery, for the election of members to serve in parliament, a copy of which is set forth; and in this part of the declaration, care must be taken that there be not a variance between the writ set forth and that produced in evidence. The delivery of the writ to the sheriff is then averred, and, in some cases, the precept of the sheriff to the returning officer, to proceed to an election. It is not necessary to set out the precept, or to state that the precept was returned[†]. The declaration then proceeds to state the election by virtue of the writ, and the names of the candidates, concluding with a precise allegation of the offence, which renders the parties liable to the penalties of the statute; and, here, the general rule of pleading must be observed, viz. that the charge must be laid with sufficient certainty, so that the party accused may be

[†] *Mead v. Robinson*, Willes, 422.

enabled to defend himself, or have the benefit of pleading it in bar to another action for the same offence; consequently the nature and amount of the bribe must be set forth: for where, in an action on this statute, the declaration merely stated, "that the defendant received a gift or reward," without specifying the nature of the bribe, whether money or goods; after verdict for plaintiff, judgment was arrested, on the ground that the charge was not laid with sufficient certainty.

It is not necessary to allege in the declaration^u, that the party corrupted gave his vote, or forbore to give it in consequence of the bribe.

The eleventh section of this statute provides, "That no person shall be made liable to any incapacity, disability, forfeiture, or penalty, by this act imposed, unless prosecution be commenced within two years after such incapacity, &c. shall be incurred; or, *in case of a prosecution, the same be carried on without wilful delay.*"

The stat. 9 Geo. 2. c. 38. after reciting the preceding section of the 2 Geo. 2. c. 24. and also reciting that prosecutions may be commenced by suing out writs against the persons so offending, within two years after incurring any incapacity, &c. imposed by that act, and the persons so suing out such writs may delay to serve the same without giving the person sued any notice thereof, by reason of which practice, the said provision for limiting the time for the prosecution of persons so offending may be evaded; for explaining and amending the said provision, enacts, "That no person shall be made liable to any incapacity, &c. unless such person has been, or shall be actually and legally arrested, summoned, or otherwise served, with any such original or other writ or process, within the space of two years after any offence against the said act has been or shall be committed."

It may be remarked, that this section of the 9 Geo. 2. explains the first part of the eleventh section of the 2 Geo. 2. c. 24.; but, at the same time that it explains part of that clause in favour of the party prosecuted, it does not deprive such party of the advantage of that defence, which was introduced in the second branch of that proviso, and which relates to the wilful delay in the carrying on of prosecutions.

An act of bribery was committed in September, 1780^v,

^u *Davy v. Baker*, 4 Burr. 2471.

^x *Bush v. Rawlins*, B. R. T. 29 & 30 G. 3. Say. Rep. 289.

^y *Petrie v. White*, 3 T. R. 5.

An action of debt was brought for this offence, on the stat. 2 Geo. 2. c. 24. The declaration was delivered in May, 1782; to which the general issue was pleaded in Trinity Term, 1782; in which term the plaintiff gave notice of trial for the next summer assizes; but the record was not carried down to trial until the summer assizes, 1788, when it was tried, and a verdict given for the plaintiff. In Michaelmas Term following, the defendant obtained a rule for staying all further proceedings, which rule was made absolute in the next term; the court being of opinion, 1st, that as the plaintiff had not assigned any reason for the delay, such delay must be considered wilful within the meaning of the eleventh section of the stat. 2 Geo. 2. c. 24.; 2d, that the defendant might take advantage of the delay, by an application to the court on motion; although by this proceeding, the objection would not appear on the record, and the judgment of the court could not be reviewed in a court of error; 3dly, that although the defendant might have claimed the benefit of the statute at an earlier stage of the cause, yet he was still entitled to it; because the application might be made at any time before judgment, the legislature having said, that if one party be guilty of a wilful delay, the other party should not be punished. It was to be considered, therefore, not as a matter of favour, but of justice and of law, that the plaintiff should not recover.

Evidence.

As by the eleventh section of the stat. 2 Geo. 2. c. 24., proceedings for the recovery of any penalty must be commenced within two years after penalty incurred, it is incumbent on the plaintiff to shew that the action was commenced within that period; either by the record, or in case it does not appear on the face of the record that the action was commenced within the limited period, then by the production of the writ.

In an action on this statute against the defendant^z, for corrupting a voter at the election of members of parliament for the borough of Heydon in Yorkshire, the declaration alleged the issuing of the precept to the returning officer, but did not state that such precept was returned. To prove the issuing of the precept, the under-sheriff produced the precept itself, under the sheriff's seal of office, together with the indenture; which indenture, without the precept, had been returned with the writ by the sheriff, the under-sheriff

^z Mead v. Luke Robinson, Willes, 425.

proving the practice there to be, not to return the precept together with the indenture. It was objected, on the part of the defendant, that the precept ought to have been returned with the indenture, and filed in Chancery; and that a copy of the precept on record ought to have been produced. But the court overruled the objection, observing, that it was not laid in the declaration that the precept was returned, but only that such precept issued; and, *therefore*, they were of opinion, that the evidence produced was sufficient.

In an action for bribery^a, the declaration stated the precept to have been directed to the *mayor only*, but the precept, which was proved, was directed to the mayor *and burgesses*; the question was, whether the precept that was proved supported the declaration? The Court of Common Pleas was of opinion that it did, and gave judgment for the plaintiff.

So where the declaration stated the precept to have been directed to the bailiffs and jurats of S^b, but the precept produced in evidence was directed to the bailiff (in the singular number) and jurats, it was holden, on the authority of the preceding case, that the variance was immaterial.

So where in an action on this statute^c, the declaration recited the writ to the sheriff for the election of members to serve in parliament, and then proceeded to state that the sheriff *made his precept* to the portreeve of the borough of Honiton, which concluded in these words: “and if the
“ said election so made, distinctly, and openly, under the
“ seal of the portreeve, and the seals of those who should be
“ present at such election, the said portreeve should certify
“ to the said sheriff, so that the said sheriff should certify to
“ his said Majesty, in his said Majesty’s Chancery, at the
“ day and place aforesaid, without delay, remitting to the
“ said sheriff one part of the aforesaid indentures, so that

^a Cuming v. Sibley, C. B. E. 9 G. 3.
(139) cited by Buller J. in King v.
Pippet, 1 T. R. 239.

^b Warre v. Harbin, 2 H. Bl. 113.
^c King v. Pippet, 1 T. R. 235.

(139) This case was afterwards brought before the Court of King’s Bench by writ of error, on the ground that the judgment had been entered for damages, as well as the debt; whereas damages could not be given in a popular action for detention of the debt, no interest attaching in the plaintiff before action brought; and of this opinion were the court, who directed the judgment to be reversed both as to the damages and the costs, which were incorporated with the damages. 4 Burr. 2489.

“ the said sheriff might remit the same to his said Majesty, “ annexed to his Majesty’s writ.” The precept, when produced at the trial, had not the word “ if,” upon which Eyre Baron non-suited the plaintiff for the variance. But the Court of King’s Bench set aside the nonsuit; and Buller J. said, “ The declaration in this case is much longer than it need have been. There is not any necessity to set out the precept; but being set forth, the question is, whether the variance be or be not material? I think it is impossible for any person to read this part of the declaration without knowing what it should be; every one must see by it that the portreeve is absolutely to certify to the sheriff, &c. The insertion of the word “ if” is a mere mistake. The sense of the precept, as stated in the declaration, is the same as that which was proved; it commands the returning officer to proceed to an election. Therefore, as this is not a variance in sense, I am of opinion, that the non-suit should be set aside.”

A copy of the poll taken at an election for members of parliament^d, examined with the original, and signed by the returning officer, is admissible evidence; for being signed by the officer, it may be considered as an original; or if it be a signed copy, it is admissible in evidence as such, on the same ground as copies of books of a public nature, registers of births, marriages, burials, &c. (140).

If A. applies to B. who has not any right to vote, and bribes him to vote for C. and D., and B. actually gives his vote for them, A. is equally guilty under this statute, as if B. had been entitled to vote; for the words of the statute are, “ any person who hath, or *claimeth to have* a right to vote.”

Hence, where the declaration charged that A. B. had a right to vote, and did vote^e; and it was proved that A. B. voted, and that his name was entered on the poll, and that the defendant gave him money for his vote; but it was not proved, that A. B. had a right, the court of B. R. held the evidence conclusive against the defendant.

So where in the declaration it was stated, that the defen-

^d Mead v. Robinson, Willes, 424.

^e Comb v. Pitt, cited in Rigg v. Curgenven, 2 Wils. 398.

(140) In R. v. Hughes, H. 1 G. 2. B. R. (cited Willes, 424.) the copy of the poll of the election of a mayor was holden to be good evidence.

dant corrupted one P. B. *having a right to vote* in the election, to give his vote for certain candidates (141), and it was proved, that P. B. did actually vote; but there was not any evidence given of his right to vote; the court were of opinion, that it was not necessary either to allege in the declaration, or to prove that the person corrupted had a right to vote (142); that the giving money to a person for his vote, and he standing by the presiding officer at the election, and giving his vote, which is received and not objected to, or controverted, is evidence of the party bribed having a right, proper to be left to a jury, although it be not conclusive evidence of such right; and on the authority of the preceding case of *Comb v. Pitt*, the court gave judgment for the plaintiff.

The party receiving the bribe (although *particeps criminis*) is a competent witness to prove the offence committed².

So it has been holden, that the party *giving* the bribe, e. g. the agent of one of the candidates, is a competent witness to prove the fact, in a case where two years had elapsed from the time of the offence committed; although it was objected that he was *particeps criminis*, and so swore to excuse himself³ (143).

f Rigg v. Curgenven, 9 Wils. 395.

g Phillips v. Fowler, E. 8 G. 2. C. B.

per Eyre C. J. Bush v. Ralling, T. 29

& 30 G. 2. B. R. Say. Rep. 289. S. P.

h Mead v. Robinson, Willes, 422.

(141) It was not alleged that the party bribed gave his vote; nor, indeed, is such allegation necessary. See ante, tit. Declaration, *Bush v. Ralling*.

(142) So in *Lilly v. Corne*, Worcester Sum. Ass. 1774, MSS. Burland B. held, that it was immaterial whether the party corrupted had a right to vote or not, as the corrupter thought he had, and the party corrupted claimed to have a right to vote, although, upon discussion of his right afterwards it should turn out that he had none.

(143) According to a manuscript note of this case, (cited by Lawrence J. 4 East, 185). Mr. J. Abney conceived, that the objection went merely to the credit of the witness, and not to his competency. The other judges put it on the ground that the two years had expired. The grounds of the decision, as stated in Willes's Rep. 424, 5. were these, 1st, that two years had elapsed since the offences were committed, and, therefore, that neither the agent nor the person bribed could be prosecuted under the act; 2d, admitting the offences had been recently committed, yet the agent could only be considered as an accomplice, and as such was a competent witness; 3d, that in this particular case, the le-

So a person claiming to be the first discoverer of the bribery of the defendant¹, and meaning to avail himself of it, if necessary, in case of the defendant's conviction (144).

The testimony of a quaker upon his affirmation is admissible in this action².

In an action on this statute, Christopher Savile, Esq. was called as a witness¹. He had been indicted for perjury at the common law, found guilty, and stood in the pillory in Mark Lane, pursuant to the judgment of the court, and afterwards received the king's pardon. Lord Ellenborough C. J. held, that he was a competent witness; admitting, however, that it would have been otherwise if he had been convicted on the statute.

¹ Heward v. Shipley, 4 East, 180.
² Atcheson v. Everitt, Cowp. 382.

¹ Dover v. Mestaer, London sittings after M. T. 42 G. 3. B. R. 5 Esp. N. P. C. 94.

gislature, by holding out inducements, and offering an indemnity (2 G. 2. c. 24. s. 8.) to offenders to discover and bring other offenders to punishment, impliedly made the discoverers legal witnesses. And they relied on the case of Phillips v. Fowler, 8 G. 2. in which Eyre C. J. had admitted an accomplice under the same circumstances to be a witness.

(144) " By the 8th section of the statute under consideration, it is enacted, that any offender against the act, discovering within a certain time any other offender within the act, so that the person so discovered be thereupon convicted, the discoverer, not having been before that time himself convicted of the offence, shall be indemnified and discharged from all penalties and disabilities incurred under the act, that is, he shall have the benefit of using the verdict against the other offender for his own indemnity. Now, it is not probable that the legislature would have made that provision with regard to a discoverer, unless they had intended he should be a witness; for if he were not, such a provision would be almost nugatory and useless; it would be holding out an inducement for parties to make a discovery, and when made, they would be precluded the benefit of it. I think, therefore, that the statute has given a parliamentary capacitation to the witness through whom the fact is discovered, and who might otherwise at common law have been incapacitated." Per Lord Ellenborough C. J. in Heward v. Shipley, 4 East's R. 183. It may be remarked, that in Bingley v. Earle, (mentioned in the case of Sutton v. Bishop, 4 Burr. 2284.) the plaintiff obtained a verdict on the evidence of Bishop, the discoverer, and it does not appear that any objection was taken to his testimony.

Stat. 7 & 8 W. 3. c. 4. Treating Act.

It may not be improper to subjoin to this section the first clause of the statute 7 & 8 W. 3. c. 4. (commonly known by the name of the Treating Act) whereby it is enacted,
 “ That no person hereafter to be elected to serve in parlia-
 “ ment for any county, city, town, borough, port, or place,
 “ within England, Wales, or Berwick-upon-Tweed, after
 “ the teste of the writ of summons to parliament, or after
 “ the teste, or the issuing out or ordering of the writ or
 “ writs of election, upon the calling or summoning of any
 “ parliament, or after any such place becomes vacant, shall
 “ by himself, or by any other means on his behalf, or at
 “ his charge, before his election, *directly or indirectly*, give,
 “ present, or allow to any person, having voice and vote in
 “ such election, any money, meat, drink, entertainment,
 “ or provision, or make any present, gift, reward, or enter-
 “ tainment, or shall at any time hereafter, make any pro-
 “ mise, agreement, obligation, or engagement, to give or
 “ allow any money, meat, &c. to or for any such person in
 “ particular, or to any such county, city, &c. in general, or
 “ to or for the use, advantage, employment, profit, or pre-
 “ ferment of any such person or place, in order to be elected,
 “ or for being elected to serve in parliament for such coun-
 “ ty, city, &c.”

An action was brought by an innkeeper against two candidates^m (at an election of representatives in parliament for the borough of Ipswich) upon a bill for provisions furnished to the voters. The bill consisted of three descriptions of charges: 1st, for provisions furnished before the *teste* of the writ; 2d, for ditto after the teste of the writ to voters resident in the borough; 3d, for ditto to voters not resident in the borough. The defendants paid money into court sufficient to cover the charges of the first and last descriptions; a verdict having been found for the plaintiff, a motion was made for a new trial, on the ground of a part of the cause of action being illegal, by the above-mentioned statute. The court made the rule for a new trial absolute, Eyre C. J. observing, that the contract was bottomed in *malum prohibitum*, and consequently the court could not enforce it. The legislature had drawn a strict line, which was not to be departed from: it said, that after the teste of the writ, no meat or drink should be given to the voters by the candidate; and that being the case, the court could not give any assist-

^m Ribbons v. Crickett and another, C. B. E. 1798. 1 Eos. & Pal. 264.

ance to the plaintiff, consistently with the principles which had governed the courts of justice at all times. The counsel for the plaintiffs having urged, that part of the provisions having been furnished to voters resident at a distance from the borough, and the verdict being good as to that part of the demand, the plaintiff might apply the money paid into court to any other part which he might think proper; Eyre C. J. in answer to this argument, said, that such payment was an admission of a *legal* demand only, and the court could not allow it to be applied to an illegal account.

It is to be observed, that although, in the foregoing case, money was paid into court to cover the demand for provisions furnished to non-resident voters, yet the statute makes no difference between resident and non-resident voters. Hence, an action cannot be maintained by an innkeeper against a candidate for provisions supplied to non-resident, any more than to resident voters, *after the teste of the writ*.

In Lofthouse v. Wharton, Durham ass. 1803. Cor. Wood, B. 1 Camp. N. P. C. 550. n.

CHAP. XV.

DECEIT.

- I. *Of the Action on the Case in Nature of Deceit,*
 1. *On an implied Warranty.*
 2. *On an express Warranty, and herein of the Sale and Warranty of Horses.*
- II. *Of the modern Action on the Case grounded on fraudulent Misrepresentation by Persons not Parties to the Contract.*

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- I. *Of the Action on the Case in Nature of Deceit,*
 1. *On an implied Warranty.*
 2. *On an express Warranty, and herein of the Sale and Warranty of Horses.*

1. **ON an implied Warranty** (1).—An action on the case, in nature of deceit, may be maintained for the breach of an implied warranty; as if a merchant sell cloth to another, *knowing* it to be badly fulled^a; so if an innkeeper sell wine as sound and good, which he knows to be corrupt, although there be not any express warranty, yet an action on the case,

^a 9 H. 6. 53. b. 1 Rol. Abr. 90. (P.) pl. 3. S. C. cited by Lawrence J. in *Parkinson v. Lee*, 2 East, 323.

(1) "By the civil law every person is bound to warrant the thing that he sells or conveys, although there be no express warranty; but the common law binds him not unless there be a warranty, either in deed or in law, for *caveat emptor*." 1 Inst. 102. a.

in nature of deceit, will lie against him; because it is a warranty in law^b (2).

In cases of this kind, however, which are grounded merely on the deceit, it is essentially necessary, that the knowledge of the party, or as it is technically termed, the *scienter*, should be averred in the declaration, and also proved.

1. The *scienter* must be averred in the declaration:

For where in an action on the case, in nature of deceit, it was stated in the declaration, that the defendant had sold certain goods, as his own goods, to the plaintiff, when in truth they were the goods of another person; it was holden, that this declaration would not maintain the action, for want of an averment, that the defendant sold the goods *sciens* that they were the goods of another person; and there was judgment for the defendant.

So where the declaration stated, that the defendant being a goldsmith^d, and having skill in precious stones, sold a stone to the plaintiff for a sum of money, affirming it to be a Bezoar stone, whereas, in truth, it was not a Bezoar stone. After verdict and judgment for the plaintiff in B. R. it was adjudged, on error in the Exchequer Chamber, that the declaration was bad, because it was not averred, that the defendant *knew* it not to be a Bezoar stone, or that he warranted it to be a Bezoar stone (3).

^b Adm. 9 H. 6. 53. b.

^c Dale's case, Cro. Eliz. 44.

^d Chandelor v. Lopus, Cro. Jac. 4.

(2) "Is it not true, that in every bargain there is a covenant? for, if I buy of you a horse, although there be not an express warranty of soundness, yet if the horse be unsound, I shall have writ of trespass on my case, and shall aver, that you sold me the horse, *knowing* it to be unsound." Per Paston J. 20 H. 6. 35. a. It seems, that by the term "covenant," in this passage, must be understood *implied promise, or warranty*.

(3) At the time of this decision great strictness was required in the allegation of a warranty. It was then essentially necessary that it should appear on the face of the declaration, that the warranty was contemporaneous with the sale. The usual and correct form for this purpose was, that the defendant *warrantizando vendidit* (see Cro. Jac. 690.). It was on this ground, and not on the ground of any distinction in terms between an affirmation and a warranty, as I conceive, that the court, in Chandelor v. Lopus, observed, that there was not an averment of warranty. It must be admitted, however, that the language of the reports^e countenances

^e See Harvey v. Young, Yelv. 20.

2. The scienter must be proved:

In an action on the case^e, for selling a horse as defendant's own, when in truth it was the horse of A.; it appeared, that the defendant bought the horse in Smithfield, but had not taken the usual precaution of having the horse legally tolled; yet as the plaintiff could not prove, that the defendant knew that the horse belonged to A., the plaintiff was non-suited; for the scienter or fraud is the gist of the action where there is not a warranty; if there be a warranty, then the party takes upon himself the knowledge of the title to the horse and also of his qualities (4).

So where the declaration stated^f, that the plaintiff bargained with the defendant to buy of him a musket, as a sound and perfect musket, for the price of two guineas and a half, and that the defendant *knowing* the musket to be unsound and imperfect, sold the same to the plaintiff as a sound and perfect musket, &c. Plea. N. G. Lord Kenyon C. J. held it to be necessary, that the scienter should be proved.

2. *On an express Warranty.*—An action on the case, in nature of a writ of deceit, may be maintained against any person who deceives, by a false assertion, and thereby injures another who has placed a reasonable confidence in him (5); as where a party^g in possession of a personal chattel

^e Springwell v. Allen, Aleyn, 91.

² East's R. 448. n. (a) S. C.

^f Dowding v. Mortimer, 2 East, 450. n. (a).

^g Crosse v. Gardner, 1 W. & M. B. R. Carth. 90. Comb. 142. S. C. See also Medina v. Stoughton, Tr. 12 W. 3. B. R. Salk. 210. Lord Raym. 593. S. C.

this distinction, frivolous as it may seem to modern readers. See further on this subject the opinions of Holt C. J. in Medina v. Stoughton, Salk. 210. Ld. Raym. 593. S. C. and of Buller J. in Pasley v. Freeman, 3 T. R. 57. As to what would be sufficient evidence to support the *warrantizando vendidit*, see Holt's opinion in Lisney v. Selby, Ld. Raym. 1120.

(4) It is to be observed, that actions on the case, for the breach of an express warranty, bear a strong resemblance to these actions on the case in the nature of deceit on implied warranties; but this distinction between them ought to be attended to; that in actions on the case in the nature of deceit, the *gravamen* is the deceit, and the gist of the action is the scienter; but in the action for breach of warranty, the *gravamen* is the breach of warranty; and where the plaintiff declares in tort for such breach, it is not necessary to allege the scienter, nor, if alleged, to prove it. Williamson v. Allison, 2 East, 446.

(5) Formerly it was usual in cases of this kind to declare in tort,

sells it, and at the time of sale affirms it to be his own, when in truth it belongs to another, the vendee may recover a compensation in damages for such injury as he can prove to have been sustained in consequence of this deceit; for the possession of a personal chattel is a colour of title, and it is but a reasonable confidence which the vendee places in the vendor, when he affirms it to be his own.

But where the affirmation is (as it is termed in some of the books) a nude assertion; that is, where the party deceived may exercise his own judgment; as where it is mere matter of opinion, or where he may make inquiry into the truth of the assertion, and it becomes his own fault from laches, that he is deceived; in this case an action cannot be maintained (6).

As if A., being possessed of a term for years^b, offers to sell it to B., saying that a stranger would have given A. a certain sum of money for this term, whereas, in truth, that sum had not been offered to A., an action on the case will not lie, although B. was, by such affirmation, deceived in the value.

N. An action on the case will lie for a breach of warranty upon the sale of a chattel, although the purchaser has not paid for it^c.

^b 1 R. A. 101. pl. 16. adjudged.

^c Per curiam, 9 H. 7. 21. b. Bro. Abs. Deceit, pl. 24.

but it was observed by Grose J. in *Pasley v. Freeman*, 3 T. R. 54. that all the cases of deceit for misinformation might, as it seemed to him, be turned into actions of assumpsit.

(6) The case of *Baily v. Merrel*, Cro. Jac. 386. and 3 Bulst. 94. affords an useful illustration of this rule.

Another class of cases, on fraudulent affirmations, for which an action cannot be maintained, was mentioned by Grose J. in *Pasley v. Freeman*, 3 T. R. 55. that is, where the affirmation is, that the thing sold has not a defect, which is visible. An instance of this kind is mentioned in argument in *Bayly v. Merrel*, Cro. Jac. 387: where a person buys a horse, which the seller affirms to have two eyes, and the horse has one eye only; in such case the purchaser (unless, as is quaintly observed in one of the year books, he be blind) is remediless; for *vigilantibus non dormientibus jura subveniunt*. See also *Dyer v. Hargrave* and others, 10 Ves. 507. where Sir William Grant M. R. said, that it was holden at law, that a warranty is not binding, where the defect is obvious, and put the case of a horse with a visible defect; and of a house without roof or windows, warranted as in perfect repair.

Warranty on Sale of Horses.—As actions are more frequently brought for the breach of warranties upon the sale of horses, than upon the sale of any other chattel, the following remarks will be confined to that subject.

A horse being an animal subject to secret maladies which cannot be discovered by a mere trial and inspection, it is usual, and in all cases prudent, for the buyer of a horse to require from the seller a warranty of its soundness; for if a horse, having a secret malady, is sold without a warranty of soundness, and without any fraud on the part of the seller, the purchaser is without a remedy. Formerly, indeed, it was a current opinion, that a sound price given for a horse, was tantamount to a warranty of soundness; but it was observed by Grose J. in *Parkinson v. Lee*, 2 East, 322. that when that doctrine came to be sifted, it was found to be so loose and unsatisfactory a ground of decision, that Lord Mansfield C. J. rejected it, and said, that there must either be an express warranty of soundness, or fraud in the seller, in order to maintain the action (7).

The advantage arising to the buyer, from an express warranty of soundness, is this, that such warranty extends to every kind of soundness, known and unknown to the seller; and if the warranty be false, the buyer has a remedy against the seller, to recover a compensation in damages.

As soon as the unsoundness is discovered, the buyer should immediately tender the horse to the seller; for otherwise he will not be entitled to recover for the keep^h.

The ancient method of declaring in cases of warranty, was in tort (8) on the warranty broken; but of late years it

k *Caswell v. Coore*, 1 Taunt. R. 567:

(7) Some pockets of hops were sold by sample, with a warranty that the bulk of the commodity answered the sample; it was holden, that the law did not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price was given, and that the seller was not answerable, though the goods turned out to be unmerchantable, in consequence of a latent defect which existed in the commodity at the time of the sale, but which was unknown to the seller, arising from the fraud of the grower, from whom he had purchased, and not from any fraud in the seller. *Parkinson v. Lee*, 2 East's R. 314.

(8) In this form of declaration the scienter need not be charged, or, if charged, need not be proved. *Williamson v. Allison*, 2 East, 446.

has been found more convenient to declare in assumpsit for the sake of adding the money counts. The propriety of the modern practice, which has prevailed generally for more than forty years, was established in the case of *Stuart v. Wilkins*, Doug. 18.

If a horse be warranted sound, but prove unsound, and the buyer offers to return him to the seller, who refuses to receive him, the buyer may, notwithstanding such refusal, maintain an action against the seller for a breach of the warranty, if he can prove that the horse was unsound at the time of warranty (9).

(9) "I take it to be clear law, that if a person purchases an horse which is warranted, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer may, if he pleases, keep the horse and bring an action on the warranty, in which he will have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty; or he may return the horse and bring an action to recover the full money paid*; but in the latter case, the seller has a right to expect that the horse shall be returned to him in the same state he was when sold, and not by any means diminished in value; for if a person keeps a warranted article for any length of time after discovering its defects, and, when he returns it, it is in a worse state than it would have been if returned immediately after such discovery, I think the party can have no defence to an action for the price of the article on the ground of non-compliance with the warranty; but must be left to his action on the warranty to recover the difference in the value of the article warranted, and its value when sold," Per Lord Eldon C. J. C. B. in *Curtis v. Hannay*, 3 Esp. N. P. C. 83.

So where an artist exhibits specimens of his art and skill as a painter, and affixes a certain price to them, if a person is induced to order a picture from an approbation of such specimens, and the execution of it, when delivered, is inferior to the specimen exhibited, he may refuse to receive it, or having received it he may return it, as not being conformable to that performance which the painter undertook to execute; but if he means to avail himself of that objection, he must return the picture; he must rescind the contract totally. Having received the article under a specific contract, he must either abide by it, or rescind it *in toto* by returning the thing sold, but he cannot keep the article received under such a specific contract, and for a certain price, and pay for it at a less price than that charged by the contract. Per Lawrence J. in *Grimaldi v. White*, 4 Esp. N. P. C. 95, "Where a contract is to

* *Caswell v. Coare*, 1 Taunt. R. 566. S. P.

This was decided in *Fielder v. Starkin*, 1 H. Bl. 17. where the buyer had kept the horse eight months, without giving any notice of the unsoundness, before he made an offer to return him. Lord Loughborough C. J. said, that no length of time elapsed after the sale would alter the nature of a contract originally false. But where there is an agreement to take a horse back¹, if *on trial* he shall be found faulty, though it is accompanied with an express warranty, yet it is incumbent on the purchaser, if he discovers any fault, to use due diligence in returning the horse; for a trial means a reasonable trial.

A horse was sold at a public auction^m, warranted six years old and sound, and one of the conditions (10) of sale was, "that the purchaser of any horse warranted sound, who should conceive the same to be unsound, should return him within two days; otherwise he should be deemed sound." Ten days after the sale, the plaintiff discovered that the horse was twelve years old, and offered to return him, but the defendant refused to receive him, and thereupon plaintiff sold the horse, and brought an action on the warranty against the seller. It was proved, that the horse was twelve years old. The jury were of opinion that the plaintiff, by not returning the horse sooner, had made him his own, and gave a verdict for the defendant; but the court set aside the verdict, and Lord Kenyon C. J. observed, that the question turned on the condition of sale, which, in his opinion, ought to be confined solely to the circumstance of unsoundness: that there was good sense in making such a condition at a public sale, because, notwithstanding all the care that

¹ *Adam v. Richards*, 2 H. Bl. 578.

^m *Buchanan v. Parnshaw*, 2 T. R. 745.

be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*." Per Lord Ellenborough C. J. in *Hunt v. Silk*, 5 East, 452.

(10) In *Mesnard v. Aldridge*, 3 Esp. N. P. C. 271. it was proved, that the conditions of sale were contained in a printed paper pasted up under the auctioneer's box, and that the auctioneer at the time of the sale had announced that the conditions of sale were as usual. Lord Kenyon C. J. held, that this was a sufficient notice to all persons who came to the sale of the conditions under which the horses were sold; and he compared it to the case of carriers, who advertise that they will not be liable for goods lost above a certain value, unless entered as such; in which case the posting up of a bill in the coach-office to that effect, had been holden to be sufficient notice.

could be taken, many accidents might happen to the horse between the time of sale and the time when the horse might be returned, if no time were limited. But the circumstance of the age of the horse was not open to the same difficulty.

Where a horse is sold with a warranty of soundnessⁿ, for a certain sum, part of which is paid at the time of sale; if the horse prove unsound, and the sum paid be equal to the value of the horse, the seller cannot recover the remainder (11).

Plaintiff sold the defendant a horse with a warranty of soundness; the defendant gave the plaintiff a bill of exchange for the price; the defendant discovering the horse to be unsound, tendered him to the plaintiff, but he refused to take it back again. An action having been brought by the plaintiff against the defendant on the bill, the defendant proved, that the plaintiff, *at the time of sale knew that the horse was unsound*. It was holden^o, that the plaintiff could not recover; for it was clearly a fraud, and a person cannot recover the price of goods sold under a fraud.

It will be proper to remark^p, that where the contract of warranty is still open, it is essentially necessary that the plaintiff should declare in a special action on the case, founded on the warranty, and not merely in an action for money had and received, to recover the price of the horse (12).

In an action for money had and received^q, to recover back

n King v. Boston, Middlesex Sittings after E. T. 1789. Kenyon C. J. 7 East, 481. n.

o Lewis v. Cosgrave, 2 Taunt. 2.

p Power v. Wells, Cowp. 818. Doug. 24. n. S. C. Weston v. Downes, Doug. 23. and ante, p. 93.

q Payne v. Whale, 7 East, 274.

(11) In cases of this kind, it will be adviseable for the defendant to give the plaintiff previous notice of the intended defence, in order that he may be prepared to meet it. But, where the sum to be paid by the defendant is not ascertained by the terms of the agreement, and the plaintiff declares on a *quantum meruit*, it is competent to the defendant, even without notice to the plaintiff, to prove that the thing sold was not worth so much as the plaintiff claims. And if it appear, that the plaintiff has been paid on account as much as the thing was worth, he cannot recover. Basten v. Butter, 7 East, 479.

(12) In what case the plaintiff may declare for money had and received, see Towers v. Barrett, 1 T. R. 133. and ante, p. 94.

the price of a horse, sold as a sound horse, and which proved to be unsound, it appeared in evidence, that there had been a warranty of soundness at the time of the original contract of sale; but in a subsequent conversation, when the plaintiff objected that the horse was unsound, the defendant said, that if the horse were unsound he would take it again, and return the money. It was contended, on the authority of *Power v. Wells*, and *Weston v. Downes*, that the action for money had and received would not lie; because this was no other than a mode of trying the warranty, which could be by a special action on the case only: and of this opinion were the court; Lord Ellenborough C. J. (who delivered that opinion,) observing, "that the subsequent conversation was not to be considered as an abandonment of the original warranty, the performance of which the defendant still insisted on; but rather as a declaration, that, if the warranty were shewn to be broken, he would do that, which is usually done in such cases, take back the horse and repay the money. Then, where any question on the warranty remains to be discussed, it ought to be so in a shape to give the other party notice of it, namely, in an action on the warranty."

It is usual to insert the warranty in the receipt for the price of the horse: in such case, the receipt, if duly stamped with a receipt stamp, will be evidence of the warranty. It does not require an agreement stamp*. And if, on the face of such receipt, it appear that *money* was the consideration paid for the horse, it will not be competent to the defendant to prove a different consideration, in order to take advantage of a variance, as will appear by the following case:

The plaintiff declared *in assumpsit*, that in consideration that the plaintiff had bought of the defendant a horse for so much money, the defendant warranted the horse to be sound. In proof of the plaintiff's case, a receipt, which had been given by the defendant, was produced, purporting to be a receipt of so much money for a horse, warranted sound. On cross examination of the witness who produced the receipt, it appeared, that the plaintiff had given a mare as well as a sum of money in exchange for defendant's horse. It was objected that there was a variance; but Graham B. was of a different opinion, observing, that the receipt admitted that the defendant had taken the mare, as money.

So, where the declaration stated, that in consideration

* *Skrine v. Elmore*, 2 Camp. N. P. C. 497. † *Brown v. Fry*, Devon Sum. Ass. 1808. MS.

‡ *Hinds v. Burton*, 9 East, 342.

that the plaintiff would buy of the defendant a horse for 31l. 10s., to be paid by the plaintiff to the defendant, the defendant promised that the horse was sound; and that the plaintiff did buy of the defendant the horse for that price, and did pay to the defendant the said 31l. 10s., and then alleged, as a breach, that the horse was unsound; it appeared in the proof, that the defendant agreed to dispose of his horse, which he warranted sound, to the plaintiff, for thirty guineas, but agreed, at the same time, that if the plaintiff would take the horse at that value, he, the defendant, would purchase of the plaintiff's brother, another horse for fourteen guineas, and that the difference only should be paid to the defendant. The witness described it as *one deal* between the parties, and that, but for the latter consideration, he did not believe that the bargain would have been made. It was therefore objected, that the proof varied from the contract as laid, and shewed rather a contract for the exchange of horses, paying the difference only in money, than an entire money payment for the horse in question. But the court overruled the objection, *Ld. Ellenborough C. J.* observing, that the parties agreed to consider the brother's horse as fourteen guineas, in their mode of reckoning the payment for the defendant's horse; but still the consideration for the latter was thirty guineas, and the defendant received thirty guineas in money and value.

II. *Of the modern Action on the Case grounded on fraudulent Misrepresentation by Persons not Parties to the Contract.*

WHERE a person, with a design to deceive and defraud another, makes a false representation of a matter inquired of him, in consequence of which, the person to whom the representation is made enters into a contract, and thereby sustains an injury, an action on the case, in the nature of deceit, will lie at the suit of the party injured, against the party making the fraudulent misrepresentation, although a stranger to the contract, from the entering into which the plaintiff was damnified (13). This was for the first time de-

(13) The old cases were confined to fraudulent assertions by one of the contracting parties, (as was justly observed by *Grave J.*

cided in the case of *Pasley and another v. Freeman*, H. T. 1789. 3 T. R. 51. which came before the court on a motion in arrest of judgment on the third count of the declaration. That count stated, "that the defendant, intending to deceive and defraud the plaintiffs, did wrongfully and deceitfully encourage and persuade them to sell and deliver certain goods to one Falch, upon credit, and for that purpose did falsely, deceitfully, and fraudulently assert, that Falch was a person safely to be trusted, &c. whereas, in truth, Falch was not a person safely to be trusted, and the defendant well knew the same, &c." The question, was, whether, admitting all the facts as stated to be true, the action could be maintained. Lord Kenyon C. J., Ashhurst and Buller, Js. were of opinion, that it might be maintained. Grose J. was of opinion, that it was not maintainable.

It may be remarked, that in cases of this kind it is not necessary, that the defendant should have derived any advantage from the deceit^a; or that he should have colluded with the person who did derive the advantage; but there must be fraud (14) in the defendant, in order to support the action^b; for in a late case, where there was not any fraud or deceit in the party making the representation, although he had incautiously asserted that to be within his own knowledge^c, which in strictness he could not be said to have known, but had reasonable and probable cause only to believe; it was holden by Grose, Lawrence, and Le Blanc, Js. that the action was not maintainable. But Kenyon C. J. was of a different opinion.

The defendant having had a credit lodged with him by a foreign house^d, in favour of one T. to a certain amount, upon

^a *Pasley v. Freeman*, 3 T. R. 51. and per Kenyon C. J. in *Eyre v. Dunsford*, 1 East, 328, 9.

^x *Tapp v. Lee*, 3 Bos. & Pul. 367.

^y *Haycraft v. Creasy*, B. R. M. T. 1801. 2 East, 92.

^z *Eyre and another v. Dunsford*, B. R. H. 41 G. 3. 1 East, 318.

in his elaborate argument in *Pasley v. Freeman*, 3 T. R. 53.) and proceeded upon the breach of a *promise*, either express or implied, that the fact misrepresented was true, and in these respects they differ from *Pasley v. Freeman*, and subsequent cases decided on the authority of that case.

(14) "By fraud, I understand an intention to deceive; whether it be from any expectation of advantage to the party himself, or from ill will towards the other, is immaterial." Per Le Blanc J. in *Haycraft v. Creasy*, 2 East's R. 108. "Fraud may consist as well in the suppression of what is true, as in the representation of what is false." Per Chambre J. 3 Bos. & Pul. 371.

an express stipulation, that there should be previously lodged in the defendant's hands, goods to treble the amount, and having been applied to by the plaintiffs for information respecting the responsibility of T., answered, that he (defendant) did not know any thing of T., except what he had learned from his correspondent, but that he had a credit lodged with him to a certain amount by a respectable house, which he held at the disposal of T. (omitting to mention the stipulation on which the foreign house had given T. credit) and that, upon a view of all the circumstances which had come to the defendant's knowledge, the plaintiffs might execute T.'s order with safety (viz. an order for the sale and delivery of goods upon credit). It was holden, that on the part of the defendant, there was a material suppression of the truth, and evidence sufficient for the jury to find fraud, which was the gist of this action; although at the time when the defendant made the representation, he added, that he gave the advice without prejudice to himself.

In ordinary cases, the person, who gives a representation of the credit of a third person is not liable beyond the value of the goods furnished on the facts of the representation^a; but circumstances may exist which will render him liable to losses arising from subsequent dealings^b.

In this action, the party^c, whose credit is misrepresented, is a competent witness for the plaintiff.

^a De Graves v. Smith, 2 Camp. N. P. C. 533. ^c Richardson v. Smith, 1 Camp. N. P. C. 277.

^b Hutchinson v. Bell, 1 Taunt. 558.

CHAP. XVI.

DETINUE (1).

- I. *Of the Action of Detinue, and in what Cases it may be maintained.*
- II. *Of the Pleadings and Evidence.*
- III. *Of the Judgment.*

I. *Of the Action of Detinue, and in what Cases it may be maintained.*

THE action of detinue may be maintained by any person, who has either an absolute or a special property in goods, against another, who is in the actual possession, either by delivery or finding^a, &c. (2) of such goods, and refuses to redeliver them.

In this action the plaintiff seeks to recover the goods in specie, or in failure thereof the value (for it is in the election of the defendant, whether he will deliver the specific goods^b, or pay the value thereof), and also damages for the detention.

^a 1 Inst. 286. b.

^b See *distringas ad deliberand.* Az-

ton's Ent. pl. 202. Dalton's Shf. 222. Rastal's Ent. 212.

(1) This action has fallen into disuse on account of the defendant being permitted to wage his law.

(2) In *Kettle v. Bromsall*, Willes, 118. it was holden, that detinue would lie for things lost and found^a, as well as for things delivered. If A. bargains and sells goods to B. upon condition, that if A. pays B. a certain sum of money at a day fixed, the sale shall be void; if A. pays the money, he may have detinue for the goods, although they came not to the hands of B. by bailment, but by bargain and sale. *Bateman v. Elman*, Cro. Eliz. 806.

^a F. N. B. 324, Ed. 4to. S. P.

As this action proceeds on the ground of property in the plaintiff, *at the time of action brought*, it cannot be maintained, if the defendant took the goods tortiously^c; for by the trespass, the property of the plaintiff is divested (3).

Hence, also, if a person detain the goods of a feme covert^d, which came to his hands before the marriage, the husband alone must bring the action; because the property is in him *at the time of the action brought*.

Property in the plaintiff, without ever having had possession, is sufficient:

Hence an heir may maintain detinue for an heir loom^e.

So if it be enacted by a statute^f, that goods imported in any other manner than as therein directed, shall be forfeited, one moiety to the king, and the other moiety to him who will inform, seize, or sue for them: a subject may have detinue for the moiety of goods imported contrary to the provisions of the statute; for by the illegal importation the property is divested out of the owners, and by bringing the action it is vested in the plaintiff, by relation, from the time of the offence committed (4).

So if I. deliver goods to A.^g, to deliver to B., B. may have detinue; for the property is vested in him by the delivery to his use.

The goods demanded must be such as can be distinguished from other property, by certain discriminating marks; as money in a bag^h; a horse; a cowⁱ; a piece of gold value

c 6 H. 7. 9. a. Bro. Abr. Detinue, pl. 53. per Brian C. J. may have replevin, pl. 36.

d Bull. N. P. 50.

e Bro. Abr. Detinue, pl. 80.

f See stat. 12 Car. 2. c. 18. Roberts q.

t. v. Withered, 5 Mod. 193. 12 Mod. 92. Salk. 293. S. C.

g 1 Rol. Abr. 606. (C) pl. 1.

h 1 Inst. 256 b. 1. Rol. Abr. 606. (A) pl. 1.

i F. N. B. 322. (A) ed. 4to.

(3) This position is cited in Com. Dig. and other books; but the opinion of Vavasor J. to the contrary, in the same case, seems to be better founded. See the reasoning of Anderson and Warburton Js. in *Bishop v. Montague*, Cro. Eliz. 824. to the same effect, but applied to the action of trover.

(4) This case was recognized in *Wilkins v. Despard*, 5 T. R. 112. where it was holden, that if a ship be seized as forfeited under the navigation act (12 Car. 2. c. 18.) by a governor of a foreign country under the dominion of Great Britain, the owner cannot maintain trespass against the governor, although there has not been any sentence of condemnation; because the forfeiture is complete by the seizure, and the property is thereby divested out of the owner.

twenty-one shillings; deeds concerning the inheritance of the plaintiff's land^k, if he can describe what they are, and what land they concern^l; or if such deeds are in a chest^m; and the like. But, for money (not in a bag or chest) or cornⁿ, and other things which cannot be distinguished from property of the same kind or description, detinue will not lie.

The gist of the action being the detainer^o, it is necessary, that the defendant should be in possession of the goods. Hence, if the bailee of goods die, detinue will not lie against his personal representative, unless he takes possession of the goods^p (5). But if, after the death of the bailee, a stranger takes the goods, detinue lies against such stranger^q.

If goods be delivered to husband and wife, detinue ought to be brought against the husband only^r. But if they are delivered to the wife before marriage, the action must be brought against husband and wife^s.

From the preceding cases it may be collected, that the grounds of the action of detinue are,

1. A property in the plaintiff, either absolute or special, (at the time of action brought) in personal goods, which are capable of being ascertained.
2. A possession in the defendant by bailment, finding, &c.
3. An unjust detention on the part of the defendant.

II. *Of the Pleadings and Evidence.*

THE manner in which the goods came into the possession of the defendant is matter of inducement only; hence, if the plaintiff declares on a bailment, the defendant cannot plead that the plaintiff did not bail the goods; for the bailment is not traversable^t. So where the plaintiff declared, that the goods came to the hands of the defendant by finding^u, and the evidence was, that the plaintiff had

^k 1 Inst. 286 b.

^l Id.

^m Banks v. Whetston, Cro. Eliz. 457.

ⁿ 1 Inst. 286 b.

^o 2 Bulst. 308.

^p 1 Rol. Abr. 607. (D) pl. 1.

^q Ib. pl. 2.

^r 38 E. 3. 1 a.

^s 1 Inst. 351 b.

^t Bro. Abr. Detinue de biens, pl. 5a.

^u Mills v. Graham, 1 Bos. & Pul. N.R. 140.

(5) Executors are chargeable in this action, on the ground of possession only. Bro. Abr. Detinue de biens, pl. 19. If there are three executors, and one hath possession, detinue lies against him only. Ib.

delivered the goods to the defendant (an infant) for a special purpose, and the defendant refused to re-deliver them; it was holden, that the evidence supported the declaration.

If the action be brought for several articles^x, it is not necessary to set forth the separate value of each in the declaration; it is sufficient if the jury sever the values by their verdict.

The plaintiff must prove the detainer of the goods precisely as laid in the declaration. Hence, in detinue for a bond for 100*l.* upon bailment^y, if defendant plead, that he did not receive a bond for such sum, and it is found, that he received a bond for a greater sum, there must be a verdict for the defendant; because the bond is not the same as that which the plaintiff demands.

The general issue in this action is non detinet, or that the defendant does not detain the goods in question. Upon this issue^z, the defendant cannot give in evidence, that the goods were pawned to him for money which has not been paid, for such matter ought to be pleaded specially; but he may give in evidence a gift from the plaintiff; for this proves, that he does not detain the plaintiff's goods.

III. Of the Judgment.

THE form of the judgment in this action is^a, that the plaintiff do recover the goods in question, or the value thereof, if the plaintiff cannot have the goods, and his damages; that is, damages for the detention (6).

The language of the judgment being in the alternative, that the plaintiff do recover the goods, or the value thereof, it is incumbent on the jury to find the value (7), and an omission in this respect cannot be supplied by a writ of inquiry of damages^b.

x Pawly v. Holly, 2 Bl. R. 853.
y 2 Roll. Abr. 703. Trial, pl. 11.
z 1 Inst. 283. a.

a Townsend's 1st. Book of Judgments, 344. 2d Book of Judgments, 82, 83, 84, 85. Aston's Entries, 202. pl. 8. Peter v. Heyward, Cro. Jac. 631, 2. Keilw. 64. b. per Frowick C. J.

b Per Coke, in Cheyney's case, 10 Rep. 119. b. recognized by Holt C. J. in Herbert v. Waters, Salk. 206. where he said, that he thought that a contrary determination in Burton v. Robinson, Sir T. Raym. 124. and 1 Sid. 246. was not law.

(6) The judgment in trover is, "that the plaintiff do recover his damages." Knight v. Bourne, Cro. Eliz. 116.

(7) If several things are demanded, the jury ought to find the value of each particular thing. East. T. 2 H. 6. 43. a.

C H A P. XVII.

DISTRESS.

- I. *Of the Nature and Origin of a Distress.*
- II. *Of the Causes for which a Distress may be taken.*
- III. *Of the Things which may, and the Things which may not be distrained.*
- IV. *Who may distrain.*
- V. *Of the Time at which a Distress may be taken.*
- VI. *Of the Place where a Distress may be taken.*
- VII. *The Manner of disposing of Distresses, and herein of the Sale of Distresses for Rent Arrear.*
- VIII. *Of Pound Breach and Rescous.*
- IX. *Of abusing the Distress, and of Irregularity in the Proceedings by the Party distraining.*

I. *Of the Nature and Origin of a Distress.*

THE power of distraining was given to the lord (in lieu of the forfeiture of the land) for the purpose of enforcing the tenant to perform those services, which were the consideration of his enjoyment of the land. Hence the distress was considered merely as a pledge, and the detention thereof was justifiable only so long as the duties incident to the tenure remained undischarged. If the tenant offered gages and pledges for the performance of the services, and the lord, after such offer, persisted in detaining the distress, the tenant might sue out a writ of replevin, the tenor of which was, that the defendant had taken and unjustly detained the goods, "against gages and pledges." This form is still preserved in the proceedings in replevin, but the offer of

gages and pledges has fallen into disuse. The replevin was considered as so much a matter of right, that if a person by deed granted a rent with a clause of distress, and granted further, that the distresses taken should be irreplevisable, yet they might be replevied, such a restriction being against the nature of a distress^a.

II. Of the Causes for which a Distress may be taken.

1. *At common Law.*—A distress may be taken for the non-performance of services, either certain or such as may be reduced to certainty^b, viz. heriot-service^c, rent-service^d, suit-service^e, that is, suit to a hundred court, or court baron; for non-payment of a fine imposed on an inhabitant of a manor, by the steward of a court leet, for refusing to take the customary oath, when elected to the office of a constable^f; for non-payment of an amerciamment in a court leet, for a nuisance^g, or for an offence done in court^h; lastly, at common law, goods or cattle damage feasant may be distrainedⁱ.

2. *By Prescription.*—By prescription, a distress may be taken for an amerciamment in a court baron^k; for a penalty imposed for a breach of a bye-law^l; for a toll in a fair^m (1).

3. *By Statute.*—It would be an endless task to enumerate all the statutes which give a remedy by distress; the following, however, cannot be passed over in silence:

By stat. 4 Geo. 2. c. 28. s. 5. “Every person, body politic and corporate, may have the like remedy by distress, and by impounding and selling the same, in cases of rent-seck (2), rents of assize, and chief rents, which have been

^a 1 Inst. 145. b.

^b 1 Inst. 96. a.

^c 1 Rol. Abr. 665. l. 47.

^d Litt. sec. 213.

^e 1 Rol. Abr. 665. l. 40.

^f 8 Co. 41. a.

^g Prat v. Stearn, Cro. Jac. 383.

^h 1 Rol. Abr. 666. l. 1.

ⁱ 1 Inst. 142. a. 161. a.

^k 1 Rol. Abr. 666. l. 6.

^l Dyer, 321. b. 322. a. pl. 23.

^m 1 Rol. Abr. 666. l. 10. 15.

(1) A distress may be taken, where the custom warrants it, for an amerciamment, or fine imposed by the steward of a court baron. Co. Ent. tit. Replevin, pl. 1.

(2) N. There cannot be a rent-seck issuing out of a term for years. Hence, if a lessee for years assign his term, reserving to himself a rent, he cannot enforce the payment of such rent by distress; because a rent so reserved was not distrainable for at com-

“duly answered or paid, for the space of three years, within the space of twenty years before the 23d day of January, 1731, or shall be thereafter created, as in case of rent reserved upon lease.”

In *Bradbury v. Wright*, Doug. 624. the court were of opinion, that a rent reserved on a grant in fee (3), made after the statute of *quia emptores*, and before the 4 Geo. 2. c. 28. was in its nature a rent-seck, and that it could not be distrained for, except under the preceding statute; in which case the distrainor, in his avowry, ought to have alleged, that the rent had been duly answered or paid, for the space of three years, within the space of twenty years, before the first day of the session of parliament in which this statute was made.

By stat. 11 Geo. 2. c. 19. s. 18. “Landlords may distrain for double rent, upon tenants who do not deliver up possession after having given notice of their intention to quit, during all the time such tenants continue in possession.”

Where there are rents for which the party cannot distrain, although he may have an assize, yet remedy may be had for such rents in a court of equityⁿ.

ⁿ Per Comyns B. Exch. Trin. 5 and 6 Geo. 2. MS.

mon law, and not being a rent-seck, it cannot be distrained for under the operation of this statute. ——— v. Cooper, C. B. 2 Wils. 375.; but in such case an action of debt is maintainable, *Newcomb v. Harvey*, Carth. 161.

(3) A rent of this kind prior to the statute of *quia emptores*, would have been properly denominated a fee-farm rent. The word *fee-farm* imports every rent or service, whatever the quantum may be, which is reserved on a grant in fee. It is not properly applicable to any rents, except rent-service. Hence, since the statute of *quia emptores*, the granting in the fee-farm, except by the king, is become impracticable; for, by the operation of that statute, the grantor parting with the fee is without any reversion, and without a reversion there cannot be a rent-service*. But a grant in fee, reserving a perpetual rent, with a power of distress, will be as good as a rent-charge†. And it seems, that if such a rent were created at this day, without a power of distress, as it must be considered as a rent-seck, it would be distrainable for under the before-mentioned statute, 4 G. 2. c. 28. s. 5.

* Litt. sec. 216.

† Harg. 1 Inst. 147. b. n. 3.

III. *Of the Things which may, and the Things which may not, be distrained.*

1. *For Rent Arrear.*—It may be laid down as a general proposition, that all moveable chattels of the tenant may be distrained for rent arrear, if they are found upon the land demised^o.

If the cattle of a *stranger* are *trespassers* on the land of the tenant, the lord may distrain them, although the stranger make fresh suit^p, and although the cattle be not *levant* and *couchant*^q. But if the cattle of their own accord leave the land, the lord cannot distrain them^r. So a lessor cannot distrain a stranger's cattle which escape from a close belonging to a stranger, into the land where the rent issues, through defect of fences, which either the lessor^s or his tenant^t was bound to repair (4).

If the estate of tenant at will be determined either by his own death^u, or by the act of the landlord, he or his executor may reap the corn sown by him. And therefore, such corn, though purchased by another person, cannot be distrained (in case of the death of the tenant at will) for rent due from a subsequent tenant.

With respect to those things which by law are privileged

^o Com. Dig. Distress, B. 1. and 4 T. R. r 11 H. 7. 4. a.

567. S. P. per Ld. Kenyon C. J. in s 2 Leon. 7.

Gorton v. Falkner.

t Dyer, 317. b. 318. a.

p 7 H. 7. 1. b. 2. a.

u Eaton v. Southby, Willes, 131.

q 15 H. 7. 17. b.

(4). "There is a difference between a lord distraining within his seignory, and a landlord distraining for rent reserved on his own lease; for the lord has nothing to do with the land or the fences, and so it is not material to him whether the fences are repaired or not; but it is otherwise of a landlord; for he himself ought to repair, or to provide that his tenant repairs them, else he would take advantage of his own wrong. And this diversity seems to be warranted by the books, Dy. 317, 318. 22 Edw. 4. 40 b. 7 H. 7. 1. 10 H. 7. 21. 15 H. 7. 17. But if the cattle escape into the land without any defect of the fences, or where the tenant of the land in which they are distrained, is not bound to repair the fences, through the defect of which the cattle escape and are distrained, it is immaterial to the lord or landlord, whether they are *levant* or *couchant* or not." Per Saunders, in *Poole v. Longueville*, 2 Saund. 299. See also *Kemp v. Crawes*, 2 Lutw. 1580.

from distress, it may be observed that some are privileged absolutely; and some conditionally. In the first class may be numbered,

1. Animals, *feræ naturæ*, whereof a valuable property is not in any person; as bucks, does, &c. Deer kept within an inclosure do not fall within this class, for they may be distrained^x.

2. Such things as cannot be restored to the owner in the same plight and condition as they were in at the time of taking them.

This exemption proceeds on the ground of the distress having been considered, at common law, merely as a pledge^y; and, for this reason, sheaves^z and shocks of corn were not distrainable; but now, by stat. 2 W. & M. c. 5. s. 3. "sheaves" or cocks of corn, or loose corn, and hay lying upon any part of the land charged with the rent, may be seized, secured, and locked up in the place where found, in the nature of a distress, until replevied; but the same must not be removed to the damage of the owner from such place."

3. Things fixed to the freehold; as furnaces, cauldrons, the doors or windows of a house, or the like^a.

At common law, corn growing could not be distrained, because it adhered to the freehold^b. But now, by stat. 11 Geo. 2. c. 19. s. 8. "Landlords, or their bailiffs, or other persons empowered by them, may distrain corn, grass, or other product, growing on any part of the land demised."

4. Things delivered to a person exercising a trade^c, to be wrought or manufactured in the way of his trade, are not distrainable, as cloth delivered to a tailor. So a horse standing in a smith's shop, for the purpose of being shod, or in a common inn (5), cannot be distrained, because it must be presumed that such things so found belong to strangers.

^x *Davies v. Powell*, Willcs, 47.

^y 1 Inst. 47. a.

^z *Wilson v. Dacket*, 2 Mod. 61.

^a 1 Inst. 47. a.

^b 1 Rol. Abr. 666. H. pl. 3.

^c 1 Inst. 47. a.

(5) It seems, that the privilege of a common inn does not extend to a livery stable. See *Francis v. Wyatt*, 1 Bl. R. 483. and 3 Burr. 1498. where the question was, "whether a carriage standing in the yard of a livery stable was distrainable for rent due to the landlord from the keeper of the livery stable?" The case was twice argued; but the court appearing to be strongly inclined in favour of the distress, the owner of the carriage declined bringing the question to a third argument, which had been directed by the court.

5. Goods distrained, damage feasant; for they are in the custody of the law^d (6).

Among those things which are privileged from distress, conditionally, may be numbered;

1. Beasts of the plough, which are exempt, if there be a sufficient distress besides on the land whence the rent issues^e (7).

2. Implements of trade, as a stocking frame^f, or a loom^g, if they are in actual use, and there is a sufficient distress besides.

3. Other things in actual use, as a horse whereon a person is riding^h, or an ax in the hands of a person cutting wood, &c.

These two last instances of exemption proceed on this ground, that if in such cases a power of distress were given by law, the exercise of it would frequently lead to a breach of the peace.

With respect to those things which may be distrained damage feasant, it may be laid down as a general rule, that all chattels trespassing on the land may be distrained damage feasant.

The law, indeed, has extended this principle so far as to permit A. to distrain the cattle of B. damage feasantⁱ, in the close of A., although they were put there by a stranger, without the privity of B. It is to be observed, however, that a horse whereon a man is riding, cannot be distrained damage feasant^k; for the same exemption is allowed here

d 1 Inst. 47. a.

e 1 Inst. 47. a. b. 161. a.

f Simpson v. Hartopp, Willes, 512.
Watts v. Davies, Scacc. H. 20 G. 3.
MS. S. P.

g Gorton v. Falkner, 4 T. R. 568.

h 1 Inst. 47. a.

i 1 Rol. Abr. 665. l. 25.

k Storey v. Robinson, 6 T. R. 138. per
Denison J. in Collins v. Renison,
Say. R. 139.

(6) It seems that the same rule holds with respect to goods taken in execution, and for the same reason. *Eaton v. Southby*, Willes, 191.

(7) But beasts of the plough may be distrained for the poor rates, although there are other distrainable goods on the premises more than sufficient to answer the value of the demand. *Hutchins v. Chambers*, 1 Burr. 579. This decision proceeded on the ground, that a seizure under the stat. 43 Eliz. c. 2., and similar acts, resembled a common law distress only in being replevisable; and that it was in other respects analogous to a common law execution, under which any goods of the debtor may be seized.

as in cases of distress for rent arrear, and for the same reason; lest by the permission of such distress a breach of the peace should ensue.

By stat. 7 Ann. c. 12. s. 3. it is enacted and declared, that process of distress against the goods of any ambassador or other public minister of a foreign state, or of their domestic servants, shall be void.

IV. *Who may distrain.*

1. *By Statute.*—By stat. 7 H. 8. c. 4. it is enacted¹, “That the recoverors of manors, lands, and advowsons, their heirs, and assigns, may distrain for rents, services, and customs, due and unpaid, and make avowry and justify the same, and have like remedy for recovering them as the recoverers might have done or had, although the recoverors were never seised thereof.”

By stat. 32 H. 8. c. 37. s. 1. “The personal representatives of tenants in fee, tail, or for life, of rent-services, rent-charges, rents-seck, and fee farms, may distrain for the arrears, upon the land charged with the payment, so long as the lands continue in the seisin or possession of the tenant in demesne, who ought to have paid the rent or fee farm, or of some person claiming under him by purchase, gift, or descent.”

This statute provides a remedy where the testator dies seised of a rent to him and his heirs, or for life, and where by his death there was not any remedy for the executor at the common law²; hence, executor of tenant for life of a rent-charge may distrain for rent arrear under this statute; but where the executor has remedy by the common law by action of debt, as in the case of an executor of tenant for years of a rent charge, if he live so long, this statute does not apply³. Neither does this statute extend to copyhold rents⁴.

By s. 3. “Husbands seised in right of their wives, in fee, tail, or for life, of any rents or fee-farms, may distrain, after the death of their wives, for arrears due in their life time.” And by s. 4. “Tenants *pur auter vie*, of rents and

¹ See 1 Inst. 104. b.

² *Houl v. Bell*, 1 Ld. Raym. 172.

³ *Turner v. Lee*, Cro. Car. 471.

⁴ *Appleton v. Dooley*, Yelv. 135.

“ fee-farms, and their personal representatives, may distrain
 “ on the land charged after the death of *cestui que vie*, for
 “ arrears due in the life time of *cestui que vie*.”

A. seised in fee, let to the plaintiff for twenty-one years, and afterwards dying seised of the reversion, the defendant administered^p, and distrained for half a year's rent due to the intestate, for which he avowed. On demurrer to the avowry, it was objected, that there was not any privity of estate between the administrator and the lessor, and therefore the avowry, which is in the realty, could not be maintained by him. And it was observed, that this was a case out of the stat. of 32 H. 8. c. 37. for that only gives a remedy by way of distress for rents of freehold, and of this opinion the court seemed (8). 1 Inst. 162. a. 4 Rep. 50. Cro. Car. 471. Latch. 211. *Wade v. Marsh* were cited.

One entitled to the separate herbage and feeding of a close^q, for a certain time, may distrain cattle belonging to the owner of the close, damage feasant there during that time.

If a terre-tenant, holding under two tenants in common^r, pay the whole rent to one, after notice from the other not to pay it, the tenant in common who gave the notice may distrain for his share.

One tenant in common may take a distress without his companions, and avow solely^s.

Grant of rent to testator for years, with a clause of distress, that the grantee and *his heirs* may distrain^t. Adjudged, that the executor should distrain, and not the heir.

p *Renvin v. Watkin*, M. 5 G. 2. B. R. MSS.

q *Burt v. Moore*, 5 T. R. 329.

r *Harrison v. Barnby*, 5 T. R. 246.

s Cro. Eliz. 530.

t *Darrel v. Wilson*, Cro. Eliz. 644.

(8) But in *Powel v. Killick*, Middlesex Sittings, M. 25 G. 2, where in trespass for entering plaintiff's house, and carrying away his goods, upon not guilty, defendant gave in evidence that he was executor of A., who was plaintiff's landlord of the house, and that he distrained for rent due to his testator at the time of his death; it was objected for plaintiff that executor was empowered to distrain only by virtue of the stat. 32 H. 8. c. 37., and that that statute extended to the executors and administrators of those persons only, to whom rent-services, rent-charges, rent-seck, or fee farms were due, and that the present case did not fall within either of those descriptions. But Lee C. J. overruled the objection, and said, this was a rent-service, the testator being in his life-time seised in fee, and the plaintiff holding under a tenure which implied fealty, Serjt. Hill's MSS. 14 D. 72, and Bull. N. P. 57. S. C.

A mortgagee after giving notice of the mortgage to the tenant in possession^a, under a lease prior to the mortgage, is entitled to such rent as shall be in arrear at the time of notice, and to the rent which accrues afterwards, and may distrain for the same after such notice.

If by a custom the lord is precluded from turning cattle on the common during a certain season of the year^x, a commoner may distrain the lord's cattle which are turned on during that time.

Wherever there is a colour of right for turning cattle on a common^y, a commoner cannot distrain, because it would be judging for himself in a case which depends on a more competent inquiry. Hence, where the right of common was for two sheep for every acre of land in the possession of each commoner, it was holden, that one commoner could not distrain the sheep of another for a surcharge (9).

The general rule, however, that one commoner cannot distrain the cattle of another may be superseded by a special agreement^z: as, where A., being possessed of a quantity of land in a common field, and having a right of common over the whole field, and B. having also a right of common over the whole field, they entered into an agreement, for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each party covenanted to that effect. During the term the cattle of B. came upon the land of A., it was holden, that A. might distrain them damage feasant; for, by the operation of the agreement, B. stood in the situation of a stranger with regard to A.

A tenant holding over after the expiration of his term, cannot distrain the landlord's cattle, which were put on the land by the landlord for the purpose of taking possession^a.

Lessee for years *assigns* his term, reserving a rent, he

^a *Moss v. Gallimore*, Doug. 278.

^x 1 Rol. Abr. 405, 406. (A.) pl. 6.

^y *Hall v. Harding*, 4 Burr. 2426.

^z *Whiteman v. King*, 2 H. Bl. 4.

^a *Taunton v. Costar*, 7 T. R. 431.

(9) But where cattle are turned on the common without any colour or pretence of right, a commoner may distrain them. Admitted in *Hall v. Harding*, 4 Burr. 2426. It was said by Bathurst J. and not denied by the rest of the court, that if a man who has a right of common upon the lord's waste, for cattle levant and couchant on his land, surcharge the common, the lord cannot for that cause distrain, for the lord cannot judge thereof. Anon. 3 Wils. 126.

cannot distrain for such rent arrear at common-law^b; because he has not any reversion; nor can he distrain for it under stat. 4 Geo. 2. c. 28. s. 5. as a rent-seck; because a rent-seck cannot issue out of a term for years; but he may maintain an action of debt^c.

V. Of the Time at which a Distress may be taken.

As rent is not due, until the last minute of the natural day, on which it is reserved^d, it follows, that a distress for rent arrear cannot be made on that day (10). Hence, at common law, if a lease was made at Michaelmas, for a year, reserving rent on the feasts of the Annunciation and St. Michael the Archangel, the lessor was deprived of his remedy by distress for the rent due at Michaelmas; because he could not distrain after the expiration of the term^e. But now by stat. 8 Ann. c. 14. s. 6. "Any person, having any rent
" in arrear upon any lease for life or lives, or for years or
" at will, may distrain for such arrears after the determina-
" tion of the lease: provided^f such distress be made within
" six calendar months after the determination of such lease,
" and during the continuance of such landlord's title or in-
" terest, and during the possession of the tenant from whom
" such arrears became due."

Although this proviso is in terms confined to the possession of the tenant^g, yet it has been holden, that where the tenant dies before the term expires, and his personal representative continues in possession during the remainder, and after the expiration, of the term, the landlord may distrain within six calendar months after the end of the term for rent due for the whole term.

It may be observed, that a distress for rent arrear can be taken only during the day-time^h (11); but cattle damage

^b ——— v. Cooper, 2 Wils. 375.

^f S. 7.

^c Newcomb v. Harvey, Carth. 161, 2.

^g Braithwaite v. Cooksey, 1 H. Bl. 465.

^d Duppa v. Mayo, 1 Saund. 282.

^e 1 Inst. 47. b.

^h 1 Inst. 142. a.

(10) "One cannot distrain the same day the rent grows due, but it must be the day after." 21 H. 6. 40. Vid. 14. H. 4. 31. Sir M. Hale, MSS., cited by Mr. Hargrave, 1 Inst. 47. b. n. 6.

(11) "Before sun-rising or after sun-set, no man may distrain but for damage feasant." Mirrour, c. 2, s. 26.

tenant may be distrained not only in the day-time, but during the night also; otherwise they might escape.

VI. *Of the Place where a Distress may be taken.*

A DISTRESS for rent-service may be taken in any part of the land holden.

So for a rent charged or reserved upon a lease upon any part of the land out of which the rent issues. And if a house be upon the land demised or chargedⁱ, a distress may be taken in the house, if the outer door be open (12). For a rent-service or rent-charge issuing out of the land, which lies in different counties, a distress for the whole may be taken in one county^k. So if a rent-charge issue out of land in the possession of many tenants, a distress may be taken upon the possession of one for the whole rent, for it issues out of each part^l. But where there are separate and distinct demises, there must be separate distresses on the several premises subject to the distinct rents, although the several premises are demised to the same tenant^m.

i 1 Rol. Abr. 671. l. 5.
k Ib. l. 27. 30.

l 1 Rol. Abr. 671. l. 33.
m Rogers v. Birkmire, Str. 1040.

(12) A distress may be in a house through the doors or windows. Com. Dig. tit. Distress. (A. 3.) "If an outward door be open, an inner door may be broken in order to take a distress," per Lord Hardwicke C. J. in *Browning v. Dann and others*, Ca. Temp. Hardw. 168. "But a padlock put on a barn door cannot be opened by force for the purpose of distraining the corn," per Lord Hardwicke C. J. N. Gates or inclosures cannot be broken open or thrown down to take a distress. 1 Inst. 161. u. By stat. 11 G. 2. c. 19. s. 7. "Any place, in which goods or chattels, fraudulently or clandestinely conveyed away, are locked up or secured, so as to prevent the same from being taken as a distress for rent arrear, may be broken open and entered in the day-time by the party distraining; first calling to his assistance the constable or other peace officer of the place, where the goods are suspected to be concealed; and in case of a dwelling house, oath being first made before a justice of the peace of a reasonable ground to suspect that such goods are therein; and the same may be taken and seized for the arrears of rent, as if they had been in an open place."

By stat. 11 Geo. 2 c. 19. s. 8. "The landlord may distress any cattle or stock of the tenant, depasturing on any common appendant or appurtenant, or any ways belonging to the premises demised."

If the lord come to distress cattle which he sees then within his fee^a, and the tenant or any other person, to prevent the lord from distraining, drive the cattle out of the lord's fee into some other place, yet may the lord freshly follow and distress the cattle; for in judgment of law the distress will be considered as taken within his fee.

A different rule holds with respect to distresses for damage feasant^b; for if the owner of the beasts chase them out of the soil, even with a view to evade the distress, yet the owner of the soil cannot distress them; because the beasts must be damage feasant at the time of the distress.

By stat. 11 Geo. 2. c. 19. s. 1. (13). "If lessee for life, Y. W. or otherwise, of lands or tenements, upon the demise whereof any rents are reserved, shall fraudulently or clandestinely carry off his goods from such demised premises, to prevent a distress, the lessor, or any empowered by him, may, within thirty days after carrying off, distress such goods, wherever found, for the rent arrear, and sell or dispose of the same, as if distrained on the premises; provided^c, before the seizure, such goods have not been sold, *bonâ fide*, and for a valuable consideration, to a person not privy to the fraud."

VII. *The Manner of disposing of Distresses, and herein of the Sale of Distresses for Rent Arrear.*

At the common law, the party distraining might have driven the distress from the place where it was taken, into

^a 1 Inst. 161. a.
^b 1b.

^c S. 2. (14).

(13) This section is copied from the second section of the fourteenth chapter of the 8th of Ann, and differs from it only as to the time allowed for the seizing the goods after the carrying off; the statute of Ann allowing only five, and this statute thirty days.

(14) This section is copied from the 3d of the 8 Ann, c. 14. with the exception of the words in *italics*.

any other place, even in a distant county. It is obvious, that the exercise of such a power must have been attended with great oppression; more especially, as the tenant was obliged to provide sustenance for his beasts, if they were impounded in an open pound; and the beasts being driven into a foreign county, the tenant must frequently have been at a loss where to make a replevin. A partial remedy for this evil was afforded by stat. 52 H. 3. c. 4. which prohibited all persons from driving the distress out of the county where it was taken. But the stat. 1 & 2 Phil. & Mary, c. 12. has given a further check to it. By the last mentioned statute it is enacted, "that no distress of cattle shall be driven out
 " of the hundred, rape, wapentake, or lath, where the dis-
 " tress is taken, except it be to a pound overt within the
 " same shire, not above three miles distant from the place
 " where the distress is taken; and no cattle or other goods
 " distrained for any manner of cause, at one time, shall be
 " impounded in several places, upon pain of forfeiting, to
 " the party grieved, one hundred shillings and treble da-
 " mages."

If the hundred, in which the cattle were distrained, be in one county, and the hundred into which they were driven be in another, the venue may be laid in either county'.

Persons distraining for rent arrear' may impound the distress in any convenient part of the land chargeable with the rent.

The stat. 11 Geo. 2. c. 19. s. 8. which empowers the landlord to seize growing crops as a distress, authorizes him
 " to cut, gather, and lay up the same, when ripe, in barns
 " or other proper place on the premises, if any; if not, then
 " in other barns or proper place, as near as may be to the
 " premises, notice thereof being given' to, or left at, the
 " last place of abode of the tenant, within one week after
 " the lodging of the distress."

Sale of Distress for Rent Arrear.—At the common law, distresses for rent arrear could not be sold, but only detained as pledges for the enforcing the payment of such rent; but now, by the stat. 2 W. & M. sess. 1. c. 5. s. 2., it is enacted, "That, where any goods or chattels shall be dis-
 " trained for any rent (15) reserved and due upon any con-

q 2 Inst. 106.

r Pope v. Davis, 2 Taunt. 252.

s Stat. 11 G. 2. c. 19. s. 10.

t S. 9.

(15) "This statute does not affect distresses damage feasant; consequently they remain, as they were at common law, mere

" tract, and the tenant or owner of the goods shall not
 " within five (16) days next after such distress, and notice
 " thereof, with the cause of such taking (17) left at the
 " chief mansion house (18), or other most notorious place
 " on the premises charged with the rent, replevy the same,
 " the person distraining may, with the sheriff or under-sheriff
 " of the county, or constable of the hundred, parish, or
 " place, where the distress is taken, cause the distress to
 " be appraised by two sworn appraisers, whom such sheriff,
 " &c. shall swear to appraise them truly, and after
 " such appraisement, may sell the same towards satisfaction
 " of the rent, and the charges of the distress and appraisement,
 " leaving the overplus, if any, in the hands of the
 " sheriff, &c. for the owner's use."

VIII. Of Pound Breach and Rescous.

1. Of Pound Breach.

An action for a pound breach lies^a, where a person distrains cattle for damage feasant in his land, or for rent or services, and puts them in the common pound, or into another pound or place, which shall be said to be a lawful pound, and the owner of the cattle, or other person, takes the cattle out of the pound, and drives them where he pleases. See the form of the writ in this action, F. N. B. 100. a. 100. b. 101. a. there called a writ *de parco fracto*.

^a F. N. B. 100. a.

pledges; and the sale of them will make the party distraining a trespasser *ab initio*." Per Lord Hardwicke C. J. in *Dorton v. Pickup*, *Sittings after M. T.* 9 G. 2. MSS.

(16) The five days are reckoned inclusive of the day of sale. *Wallace v. King*, 1 H. Bl. 13.

(17) It is not necessary to set forth in the notice at what time the rent became due. Per Buller J. in *Moss v. Gallimore*, *Deng.* 280.

(18) In *Walter v. Rumbal*, *Ld. Raym.* 53. it was holden, that notice to the tenant was good notice under this act, the sole object of the statute being, that the party should have notice; which object was more effectually attained by a notice given to the party himself, than by a notice left at the mansion house, or most notorious place on the premises.

If a person sends his servant to distrain for rent or services^x, and the servant distrains the cattle, and impounds them, and a stranger takes them out of the pound, the action must be brought by the master and not the servant; for it is the master's pound.

If a person distrain cattle for damage feasant, and put them in the pound^y, and the owner, who *had common there*, make fresh suit, and find the door unlocked, he may justify the taking away the cattle in a *parco fracto*. If the owner break the pound, and take away his goods, the party distraining may have his action *de parco fracto*, and he may also take his goods that were distrained wheresoever he find them, and impound them again.

A pound-keeper is bound to receive every thing offered to his custody, and is not answerable whether the thing were legally impounded or not^z. If the cattle be wrongfully taken, the person who brings the cattle is answerable, and not the pound-keeper, unless it can be proved that he has transgressed the limits of his duty, and assented to the trespass. When the cattle are once impounded, he cannot let them go without a replevin, or without the consent of the party. When the cattle are in the pound, they are in the custody of the law; and if the pound is broken, the pound-keeper cannot bring an action, but the person who distrained them.

See the statute 2 W. & M. first sess. c. 5. at the close of the next section.

2. Of Rescous.

Rescous, as far as the same relates to distress, means the taking away and setting at liberty, against law, a distress taken^a.

Rescous lies, where a person distrains for rent or services, or for damage feasant, and is desirous of impounding the distress, and another person rescues the distress from him^b.

The party distraining must be in possession of the distress, otherwise there cannot be a rescue^c. But although rescue will not lie at the suit of a person who is prevented by another from making a distress, yet an action on the case will lie for the disturbance.

If a person send his servant to distrain^d, and rescous be

x F. N. B. 100. a. 100. b.

y 1 Inst. 47. b.

z *Badkin v. Powell*, Cowp. 476. cited by Buller J. in *Brandling v. Kewt*, 1 T. R. 62.

a 1 Inst. 160. b.

b F. N. B. 101. a.

c F. N. B. 102. b.

d F. N. B. 101. b.

made upon the servant, the action must be brought by the master who sustains the injury, and not by the servant.

If a distress is taken without cause, as where rent is not due^e, the owner may make rescous before the distress is impounded^f. So, if the owner tender the rent before distress taken^g. But, after the distress is impounded, the owner cannot break the pound, and take the distress out of the pound; for it is then in the custody of the law^h.

The action of rescous has fallen into disuse; the usual remedy at this time is by an action on the case. By stat., 2 W. & M. first sess. c. 5. s. 4. it is enacted, "That upon any
 " pound breach, or rescous, of goods or chattels distrained
 " for rent, the party grieved shall, in a special action on
 " the case, for the wrong thereby sustained, recover treble
 " damages and costs against the offenders, or against the
 " owners of the distress, in case the same be afterwards
 " found to have come to their use or possession."

The construction put on this statute has beenⁱ, that the word treble shall be referred as well to the word costs, as to the word damages.

Proof of a tender of the rent after the impounding of the distress, will not bar an action on this statute^k.

IX. *Of abusing the Distress, and of Irregularity in the Proceedings of the Party distraining.*

AN abuse of the distress makes the party distraining a trespasser *ab initio*, except where it is otherwise provided by statute^l.

In trespass for breaking and entering the plaintiff's house^m, and taking and carrying away his goods, the defendant justified the taking and carrying away the goods, as a distress for damage feasant: replication, that after the distress, the defendant converted them to his own use: on demurrer, it was urged, that the replication was a departure; for it did

e 1 Inst. 160. b.

f Id. 47. b.

g Id. 160. b.

h Id. 47. b.

i Lawson v. Story, Lord Raym. 19.
 Carth. 321. S. C.

k Firth v. Purvis, 5 T. R. 432.

l See at the close of this section 11 G.
 2. c. 19. s. 19. & 17 G. 2. c. 38. s. 8.

m Gargrave v. Smith, Salk. 221.

not support the plaintiff's declaration in trespass, but shewed rather that he ought to have brought trover on the conversion; but the court overruled the objection, observing, that *he who abuses a distress is a trespasser ab initio*; and, therefore, if in trespass the defendant justifies *in nine districts*, the plaintiff may shew an abuse, and it is not a departure, but will support the declaration; and so it does in this case; for the conversion is a trespass or trover at the plaintiff's election; and the matter disclosed in the replication makes good his election; for it proves it a trespass as well as a trover. See *Dye v. Leatherdale*, 3 Wils. 20. where the same point was ruled, and the authority of the preceding case recognized.

By stat. 11 Geo. 2. c. 19. s. 19. "Where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent; the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*, but the party grieved may recover satisfaction for the special damage in an action of trespass, or on the case, at the election of the plaintiff; and if he recover he shall have full costs." But by s. 20. of the same statute, it is provided, "That no tenant or lessee shall recover in such action, if tender of amends has been made before action brought." By stat. 17 Geo. 2. c. 38. s. 8. "Where any distress shall be made for money justly due for the relief of the poor, the distress shall not be deemed unlawful, nor the party making it a trespasser on account of any defect or want of form in the warrant of appointment of overseers, or in the rate or assessment, or in the warrant of distress thereupon, nor shall the party distraining be deemed a trespasser *ab initio*, on account of any irregularity which shall be afterwards done by him, but the party grieved may recover satisfaction for the special damage in an action of trespass, or on the case, with full costs; unless tender of amends is made before action brought."

Trespass lies against a landlord, who, on making a distress for rent, turns the tenant's family out of possession, and continues in possession after the rent is paid. But trespass will not lie for an excessive distress merely (19).

n S. 9.
o S. 10.

p *Etherton v. Popplewell*, 1 East, 159.

(19) *Hutchins v. Chambers*, 1 Burr. 590. S. P. In this case the rule was settled, "that trespass will not lie for an excessive dis-

Plaintiff brought trespass in C. B. for taking an excessive distress^a, and recovered; but on error in B. R. the judgment was reversed, on the ground that trespass would not lie; the entry and distress being lawful, in part, for the rent due, and the whole being one act; and that it was not like the case, *W. v. W.*¹ where there was a subsequent abuse of the distress.

The proper remedy for an excessive distress is, an action on the case, founded on the statute of Marlbridge, 52 H. 3. c. 4. which provides, "that distresses shall be reasonable, " and that persons taking unreasonable distresses shall be " grievously amerced for the excess of such distresses." But this action cannot be maintained after a judgment recovered in replevin^r.

q *Lynn v. Moody*, Fitzg. 85. s Str. r *Philips v. Berryman*, Trin. 23 G. 2. 851. S. C. B. R. MS.

treas;" but it was said, that there was one excepted case^a, namely, where gold or silver was taken to an excess, apparent on the face of it; as where six ounces of gold and 100 ounces of silver were taken for 6s. and 8d.; but that proceeds on the ground, that gold and silver are of a certain and known value, and the measure of the value of other things.

* *Moir v. Munday*, B. R. H. 28 G. 2. cited in 1 Burr. 582. and by Kenyon C. J. in *Crowther v. Ramsbottom*, 7 T. R. 658.

END OF THE FIRST VOLUME.





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